Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI,
Petitioner,

v.

DAVID INGREBRETSEN and AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Chapter 609, Mississippi Laws of 1994, held unconstitutional on its face by the Court of Appeals, permits, but does not compel, student-initiated, non-sectarian, non-proselytizing prayer or religious speech at school events. The questions presented are:

1. Whether Respondents met the Article III requirements of personal standing to sue and demonstrating a ripe, concrete "case or controversy," where the challenged student-initiated prayer statute had never been invoked or utilized by a third party student at the time of the complaint and injunction, and where there was no specific proof as to whether, where, when, and in what context a respondent would be personally subjected to the religious speech of a third party student.

2. Whether the generic burden of proof in a constitutional challenge to a statute on its face, as set forth in *United States v. Salerno,* 481 U.S. 730, 745 (1987) and its progeny, which requires a plaintiff to establish that there is "no set of circumstances" in which a statute could permissibly operate and which prohibits reliance on "worst case" hypotheticals, is applicable and must be followed in Establishment Clause cases.

LIST OF PARTIES

Parties to the proceedings, including those named in the caption, are as follows:

PETITIONER:

Mike Moore, Attorney General of Mississippi

RESPONDENTS: (Plaintiffs-Appellees in Court of Appeals)

David Ingrebretsen, on behalf of himself and his daughter, Anna Ingrebretsen; Berlena McCallum, on behalf of herself and her son, John M. Dozier; The Rev. Dr. Donald Bell, on behalf of himself and his daughter, Kathryn Diana Bell; William D. Lamson, on behalf of himself and his daughter, Leigh Lamson-Quay; Terry Bacola, on behalf of herself and her sons, Brian Bacola and Darren Bacola; Robert S. McGowan; Jerusha Degroote; John Baker; American Civil Liberties Union of Mississippi, Inc.

* * *

Amelia Freeman, Jessica Masey, and Stacy Smith were movants for intervention in the district court, Appellants-Movants in the Court of Appeals, who were denied intervention as defendants.

The Jackson, Mississippi, Public School District was a named defendant in the district court, but did not appeal to the Court of Appeals and was not an appellant in that court.

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PETITION FOR A WRIT OF CERTIORARI

Mike Moore, Attorney General of Mississippi, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. A, 1a-11a) is reported at 88 F.3d 274 (5th Cir. 1996).

The dissenting opinion of Circuit Judge Edith H. Jones, joined by five Fifth Circuit Judges, dissenting from the denial of the Attorney General's Suggestion for Re-

hearing En Banc, is reported at 88 F.3d at 281, and is contained within the Appendix at 12a-27a.

The district court opinion (App. B, 28a-63a) is reported at 864 F.Supp. 1473 (S.D. Miss. 1994).

JURISDICTION

The judgment and opinion of the Court of Appeals affirming the district court was entered on January 10, 1996. A timely Suggestion for Rehearing En Banc was filed by the Attorney General. On May 31, 1996, the Court of Appeals, treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, denied the Petition for Panel Rehearing and denied the Suggestion for Rehearing En Banc. App. 12a.

The jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. § 1254(1). Plaintiffs in the district court invoked jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2, Cl. 1, which provides in part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, ..."

U.S. Const. amend. I, which provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."

1994 Miss. Laws Ch. 609, codified as Miss. Code Ann. § 37-13-4.1 (1996 Rev.), is reproduced in Appendix C, 64a-66a.

STATEMENT OF THE CASE

In this Petition, the Attorney General of Mississippi seeks review by this Court of an opinion and judgment of the Fifth Circuit Court of Appeals which leaps to invalidate and to enjoin a state statute on its face under the

Establishment Clause, but which pushes aside and ignores fundamental and important framework issues, including Article III justiciability, in order to do so.

Chapter 609, Mississippi Laws of 1994 [now codified as Miss. Code Ann. § 37-13-4.1], was passed in April 1994 with an effective date of July 1, 1994. Chapter 609 is declaratory in nature, and permits, but does not compel, student-initiated, non-sectarian, nonproselytizing, prayer or religious speech at school and student events.[1] Chapter 609 is reproduced in its entirety at App. C, 64a. Chapter 609 acknowledges that students, like other citizens, have certain rights of free speech and free exercise, and its intent, as stated in the statute, is to protect the freedom of speech of students and to "accommodate the free exercise of religious rights of . . . student citizens in the public schools and at public school events as provided them by the First Amendment . . . and the judicial interpretations thereof as given by the United States Supreme Court."

At the time of the complaint and the federal court injunction and invalidation of Chapter 609, no student had invoked, or sought to invoke, Chapter 609, nor had any student-initiated prayer taken place with reference to the statute.

The § 1983 complaint in district court was filed several days after the "effective" date of Chapter 609. App.

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[1] Specifically, Chapter 609, without otherwise limiting free speech and free exercise of religion, permits:

> [o]n public school property, other public property or other property, invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer . . . during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events.

The statute disclaims state support, approval or sanction of any prayer or similar activity that occurs on public property, and it disavows the promotion or establishment of any religion or religious belief. § 1(4).

E, 70a. Named as plaintiffs, Respondents here, were the American Civil Liberties Union of Mississippi, various ACLU members, and several minors who, it was generally stated, "are students" or "were students" in the Jackson Public School District.[2] 72a. The complaint did not state which of the numerous campuses in the Jackson School District these present or former students attended, nor did any plaintiff named in the complaint testify at any preliminary injunction hearing.[3]

In their complaint, the Respondents, antagonistic to students' potential exercise in any school setting of certain apparently disfavored civil liberties, essentially alleged that Chapter 609 violated the Establishment Clause because a student might be "forced" to listen to the religious speech or viewpoint initiated by some other stu-

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[2] Named as Defendants in the district court were the Jackson Public School District and the Attorney General of Mississippi. The Jackson Public School District, not hostile or adverse to the ACLU suit or claims of unconstitutionality, stated in court that it took "no position" on the suit and that it wanted the district court to issue an advisory opinion so it would have "guidance from the federal court." 1 R. 25. It was not an appellant in the Fifth Circuit. *Cf. Muskrat v. United States*, 219 U.S. 346, 359-360 (1910) (a federal court may not issue an advisory opinion in a "friendly" lawsuit).

[3] The only witnesses called by the Respondent ACLU were Jackson Public Schools Acting Superintendent Merritt and Provine High Principle Reeves, both of whom speculated that "something" was going to happen in the Jackson schools. On cross-examination by the Defendant Attorney General, Merritt admitted that he had no personal knowledge that any student had indicated that he or she was going to engage in any religious speech at any school and that he knew of no "imminent risk" that any particular student would do anything. App. F, 77a. Similarly, the other witness, Principal Reeves, admitted that he did not have "any personal knowledge" at present of any student who had indicated that he would engage in any type of religious speech, 3 R. 49, and that at Provine High he had never had any situation in which students had sought to engage in religious speech in the classroom. App. G, 78a.

dent in a school setting and at all school events. 73a. At the same time, the Respondents filed a motion for preliminary injunction to enjoin Chapter 609 in its entirety and on its face.

In opposition to the Respondents' complaint and motion for preliminary injunction, the Attorney General of Mississippi, Petitioner here, filed a motion to dismiss the complaint or for summary judgment, App. D, 67a, with a supporting brief, asserting, *inter alia*, (1) that the court must construe Chapter 609 to avoid a danger of unconstitutionality if fairly possible; [4] (2) that the Respondents lacked personal standing and sought to litigate matters which at that time were hypothetical, contingent, speculative, and failed to present an immediate and concrete "case or controversy" for federal injunctive relief under the Article III doctrines; (3) that Respondents could not meet their burden of demonstrating that Chapter 609 was unconstitutional on its face under the *Salerno* burden of demonstrating facial invalidity; [5] and (4) that Chapter 609 was valid under the controlling principles set forth by the Fifth Circuit in *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993) ("*Jones II*"), which distinguishes truly student-initiated religious speech at schools from religious speech directed or sponsored by school administrators.[6]

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[4] *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) ("where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality").

[5] *United States v. Salerno*, 481 U.S. 730, 745 (1987); *Akron Center, supra*, 497 U.S. at 514.

[6] In *Jones II*, the Fifth Circuit upheld as constitutional on its face a school board resolution which passively permitted, but did not mandate, a student-initiated prayer at high school graduation ceremonies. Moreover, the Petitioner further pointed out that the real target of the Respondents' suit—student-initiated religious speech—was *private* action, not state action, for purposes of

The district court, Hon. Henry T. Wingate, District Judge, rejected each and every argument and point advanced by the Petitioner, denied the Petitioner's motion to dismiss, and granted the motion for preliminary injunction. App. B, 28a. The district court ruled that Chapter 609 violated the Establishment Clause and shall be totally enjoined in its "enforcement" and "in all parts" except as to student-initiated commencement speech. 63a.

In order to reach the Establishment Clause "merits," the district court rejected almost out-of-hand the Petitioner's argument that a present, concrete, ripe, "case or controversy" for injunctive relief, by plaintiffs with personal standing to sue, had not been demonstrated, noting, *inter alia*, that there was a "public outcry" and "interest" about school prayer.[7] 42a.

The district court further expressly rejected the Petitioner's contention that the *Salerno/Akron Center* burden of proof for facial challenges had not been met; District Judge Wingate explicitly ruled that the generic facial in-

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§ 1983, and that the issuance of an injunction regarding Chapter 609 might chill or otherwise serve as a prior restraint on protected First Amendment speech by such third party students. 1 R. 69.

[7] The "Bishop Knox" incident, mentioned by the district court, in which a principal was fired and then suspended for not prohibiting a student-initiated prayer, occurred at one high school in the Jackson School District on three occasions in November 1993, over seven months prior to the effective date of Chapter 609 and nine months prior to the hearing on preliminary injunction. 1 R. 46-63. Indeed, employment litigation over the incident had already concluded in state chancery court with a judgment in favor of Knox, a principal at Wingfield High in Jackson, against the Jackson Public School District, when suit was filed. It is fundamental that a *past* event does not constitute an immediate and current controversy between plaintiff and defendant which is necessary before federal injunctive relief may issue, *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974), and not even the Fifth Circuit panel endorsed the notion that a media circus creates a justiciable controversy.

validity burden set forth in *Salerno did not apply at all* in Establishment Clause cases. 43a-44a.

Moreover, on the merits, the district court further held that the Fifth Circuit decision in *Jones II, supra*, applied only to commencement ceremonies, and not to student-initiated speech at other student-related school events on public property, such as sporting events. 50a-60a. In this regard, the district court opined that prayer or religious speech should not have an "exalted" status. 58a. In the district court's broad view, the "dictates" of the Establishment Clause and the "zeal" of the federal courts have appropriately banished prayer and religious speech from our "educational laboratories," 61a.[8]

On appeal by Petitioner, a panel of the Fifth Circuit consisting of Circuit Judges Davis and Parker, and Senior District Judge Lucious Bunton, affirmed the district court injunction and invalidation of Chapter 609. App. A, 1a. In reaching the Establishment Clause "merits," the Court of Appeals rejected in cursory fashion the Petitioner's Article III standing and justiciability arguments. 4a. It refused to consider whether Respondents had standing to sue under the traditional core components of standing, including a *personal*, imminent, injury in fact, and instead concluded only that it was "inevitable" that Chapter 609 will be used and that there will be "state involvement" in prayer. 4a. Moreover, in a footnote the panel agreed with the district court that the *Salerno* burden of proof did not apply at all in a facial challenge under the Establishment Clause. 7a. The panel further refused to consider the principles set forth in *Jones II* as a basis for upholding the statute on its face.

Petitioner's Suggestion for Rehearing En Banc was denied, with six judges of the Fifth Circuit dissenting from

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[8] *Cf. Board of Education v. Mergens*, 496 U.S. 226, 247-248 (1990), where this Court, in upholding the federal Equal Access Act, held that the Establishment Clause could not be utilized as a tool of discrimination to prohibit students' religious viewpoints.

the denial and Circuit Judges Will Garwood and Patrick Higginbotham not participating at all. 12a. In dissent, Judge Edith H. Jones, joined by Judges E. Grady Jolly, Jerry E. Smith, Barksdale, Emilio Garza, and DeMoss, termed the panel decision a "paradigm of errors that bedevil Establishment Clause jurisprudence," in which the panel's "misapplication of traditional doctrines of judicial restraint" had resulted in an injunction antithetical to the personal religious liberty of students.[9] 13a.

In Judge Jones' view,

> [T]he court had no warrant either to adjudicate a case in which plaintiffs have not been injured and cannot assert a justiciable controversy, or to decide the facial constitutionality of this statute.

13a. Judge Jones noted that because Chapter 609 permits, but does not compel, student-initiated prayer, and its invocation thus "rests with [third party] students rather than school administrators," 15a, the panel's conclusions were "not based on facts" but solely upon "predictions and hypotheticals." 16a; furthermore, a speculative "fear of exposure" to student-initiated prayers in the future "is simply not injury." 19a.

Moreover, in the dissenters' view, the panel's discarding of the *Salerno/Akron Center* burden in a facial Establishment Clause challenge had inevitably and impropery resulted in a decision based on a "wholly hypothetical, worst case scenario about the application of the statute." 20a. Establishment Clause cases properly "do not deviate from this rule of judicial restraint." 21a.

Judge Jones observed that this case matters not only because "it breaches the limit of judicial authority," but because it also adds to the unfortunate, secularizing effect

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[9] Judge Jones observed that "the real chilling effect of the federal court's injunction falls upon students who have now been deterred from exercising their constitutional rights of free speech, assembly, and religious practice in conjunction with school events." 19a-20a.

of a number of lower federal court decisions that have been rendered notwithstanding Supreme Court pronouncements that official hostility to religion is prohibited. 23a-27a. She stated:

> Every time a federal court writes an unduly broad Establishment Clause decision concerning public schools, we encourage further misunderstandings, to the detriment of students' constitutional rights and the goal of teaching about religion in public schools. 25a.

Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DISREGARDED FUNDAMENTAL ARTICLE III REQUIREMENTS OF PERSONAL STANDING TO SUE AND OF A RIPE, CONCRETE "CASE OR CONTROVERSY," BEFORE STRIKING DOWN THE STUDENT-INITIATED PRAYER STATUTE.

The cavalier and erroneous approach of the Fifth Circuit panel to important Article III limitations before enjoining and striking down a state statute under the Establishment Clause constitutes a plain departure from the admonitions of this Court and warrants the exercise of this Court's supervisory authority over the lower federal courts. The Court of Appeals improperly went out of its way to determine the purported merits of Establishment Clause issues while ignoring fundamental Article III "case or controversy" requirements and prudential limitations on the authority of a federal court. The necessary framework that must appear before the adjudication of constitutional questions can take place was missing here.[10]

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[10] The dissenters below noted their disagreement with "the panel's interpretation of Supreme Court establishment clause 'tests' in this case" but stated that criticizing the substance of the decision was unnecessary because the panel "never should have reached"

Chaper 609, fairly read, is declaratory in nature. Nothing in the language of Chapter 609 directs, coerces, or compels students—private actors—to initiate any prayer, benediction, or invocation at school-related student events. The statute on its face does not mandate that any religious speech or prayer occur at all at any time—instead this is left to private choice. More importantly, at the time of the Respondents' complaint and the injunction, no student with a religious message had invoked the statute, and there was no proof that any particular Respondent had been or would be personally subjected to any religious speech by another student at the school he attended. No plaintiff testified at the injunction hearings. There was no specific proof at all as to whether, where, and when any third party student would engage in religious speech at all which might be "offensive" to a particular plaintiff. Similarly, there was not, and could not be, any concrete factual proof as to the precise context, or content, of any such hypothetical religious speech by a third party student.

As succinctly stated by Circuit Judge Jones in her dissent, this case "did not present a factual, specific dispute" and "these plaintiffs did not sufficiently demonstrate injury." 20a.

It is fundamental that all actions brought in federal courts for injunctive and declaratory relief must meet the requirement of an actual, immediate, concrete "case or controversy" under Article III of the Constitution. *Allen v. Wright*, 468 U.S. 737, 750-754, (1984); *Golden v. Zwickler*, 394 U.S. 103 (1969); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Federal courts are not intended to serve simply as a "vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-475 (1982),

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the substantial Establishment issues. 16a. Petitioner agrees with these observations and approach.

this Court emphatically held that the related and often overlapping Article III principles regarding standing, ripeness, and the prohibition of advisory opinions, applied with full force, and were not to be relaxed, in Establishment Clause cases, just as in all other constitutional challenges in federal courts.[11]

The doctrines of Article III justiciability must be adhered to because they are a component of the separation of powers and are designed to confine the federal courts "to their proper—and properly limited—role in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1994); *Valley Forge*, 454 U.S. at 472. They may not be glossed over or disregarded, as the Court of Appeals did here.[12]

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[11] As stated in *Valley Forge*, Article III precludes the federal courts from becoming "judicial versions of college debating forums," 454 U.S. at 473. The Court specifically rejected the plaintiffs' argument that the traditional requirements of standing, including the demonstration of a distinct and personal injury-in-fact, should be overlooked where violations of the Establishment Clause were alleged. The Court stated:

> Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.

454 U.S. at 488-489.

[12] Justice Powell aptly observed that to gloss over the important Article III doctrine necessarily leads to a judicial activism that is ultimately counterproductive to public confidence in the federal courts. "Relaxation of standing requirements is directly related to the expansion of judicial power." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). That admonition rings true in this case.

A. The Court of Appeals Erroneously Held That Respondents Had Personal Standing To Sue for Injunctive Relief.

Standing to obtain an injunction cannot be inferred argumentatively and requires, *inter alia*, that the plaintiff clearly demonstrate that he himself "has sustained or is immediately in danger of sustaining" a distinct injury in fact which is both "real and immediate," not conjectural or hypothetical; the injury to the plaintiff himself must be "certainly impending," not merely possible. *City of Los Angeles*, 461 U.S. at 101-102 (1983); *Whitmore v. Arkansas*, 495 U.S. 149, 155-159 (1990). *See generally, Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-232 (1990). Article III establishes "irreducible minimum" requirements for standing, *Valley Forge*, 454 U.S. at 472. The plaintiff must demonstrate (1) "personal injury," (2) that is fairly traceable to the government's conduct (rather than that of third parties), (3) which is likely to be redressed by a court decision. *Id.; Allen v. Wright*, 468 U.S. 737, 751 (1984). *See also, Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (the injury must be one caused by "the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court").

The Court of Appeals refused to analyze the personal standing of Respondents to seek an injunction regarding Chapter 609 under the traditional components set forth above. Instead, the Court of Appeals panel only concluded in hypothetical fashion that it is "inevitable" that Chapter 609 will be used and that there will be "improper state involvement" in prayer. 4a. On its face, this novel approach does not square with the requirements of standing set by this Court. The Respondents plainly failed to demonstrate their personal standing: they did not demonstrate a personal, non-speculative, "injury" in fact, or the

necessary factual context of an "injury" to them that was imminent and "certainly impending," *Whitmore, supra.*[13]

B. There Was No Ripe Case or Controversy.

Moreover, for many of the same reasons discussed above, the Court of Appeals erred in invalidating Chapter 609, because there was no "ripe" case or controversy for adjudication. *See* Opinion of Jones, J., dissenting, at 20a. To be ripe, a "constitutional question . . . must be presented in the context of a *specific* live grievance," *Golden v. Zwickler*, 394 U.S. 103, 110 (1969) (emphasis supplied), and not based on "speculative contingencies," *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975). The ripeness doctrine prevents premature adjudication and discourage litigation "of contingent future events that either may not occur at all, or, at least may not occur as anticipated." 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984).

Here, there was *no* specific live grievance underway regarding Chapter 609, only speculative contingencies; Chapter 609 was new and had never been invoked or

[13] As discussed previously, the Respondents did not allege in their complaint, much less prove, that any student religious speech had been engaged in pursuant to Chapter 609 at any school which they attended, nor was there any specific showing that any specific third party student at any particular school would in fact, or was likely to, engage in religious speech, or the context of such speech. Unless a third party student chooses to engage in prayer, a contingent matter, Chapter 609 does not come into play at all. Neither a zealous belief that the Establishment Clause has been violated by a government statute, nor the mere exposure to conduct with which one disagrees, are sufficient "injury," *Valley Forge*, 454 U.S. at 485-486. Moreover, standing to seek an injunction exists only where the plaintiff *himself* is in immediate danger of sustaining an injury that is certainly impending. *City of Los Angeles, supra*; *Whitmore, supra.* The necessary factual inquiries of justiciability, including the questions of who, what, where, when, and under what circumstances, were entirely missing here. The burden to establish such matters clearly fell on Respondents, and they plainly failed to meet their burden. *FW/PBS, supra.*

"applied" in any manner. Where, as here, underlying factual circumstances necessary for an informed decision have not coalesced, a suit is premature. As noted by Judge Jones in her dissent, "the controversy is not ripe until . . . unconstitutional prayer occurs or is actually scheduled to occur." 20a.

C. A Federal Court Is Not Empowered to Decide "Abstract Propositions."

In addition, the same justiciability considerations particularly apply where a statute, like Chapter 609, is primarily declaratory in nature and has not been applied to restrict the activities of plaintiffs—even though some concerned bystanders read it and get mad. In *Webster v. Reproductive Health Services*, 492 U.S. 490, 504-507 (1989), a portion of a Missouri abortion statute which declared that life began at conception—allegedly contrary to *Roe v. Wade*—was challenged by plaintiffs as facially unconstitutional. The Court concluded that it was not empowered to decide "abstract propositions" where there was "no concrete set of facts." As stated in *Webster*, "with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure." 491 U.S. at 506 (Opinion of Rehnquist, J.), *quoting, Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 460 (1945). As further pointed out by the Court, "[i]t will be time enough for federal courts to address the meaning of the preamble *should it be applied to restrict the activities of appellees in some concrete way*." *Id.* (Emphasis supplied). Justice O'Connor joined, similarly noting that "all of these intimations of unconstitutionality are simply too hypothetical" to support declaratory and injunctive remedies, 491 U.S. at 523 (O'Connor, J., concurring).

No such "restrictions" ever occurred with respect to the Respondents, nor was there a "concrete set of facts", yet the panel made conclusions which were "not based on any

facts but solely on predictions and hypotheticals spawned by a broadly drafted statute." Opinion of Jones, J., dissenting, at 16a.

In this case, "neither the plaintiffs' lack of standing nor trepidation over a premature declaration of facial invalidity persuaded the panel to forebear." *Id.* at 23a. The Court of Appeals' disregard of Article III doctrines and lack of judicial restraint warrant review by this Court.

II. THE COURT OF APPEALS ERRONEOUSLY HELD THAT ESTABLISHMENT CLAUSE CASES ARE EXEMPT FROM THE GENERIC BURDEN OF PROOF WHICH APPLIES IN A FACIAL CHALLENGE TO A STATUTE, AS SET FORTH IN *SALERNO* AND ITS PROGENY.

The Court of Appeals further erred on a second fundamental framework issue regarding the burden of proof in a facial challenge to a statute.

The district court explicitly held that the generic burden of proof which must be met before a state statute may be declared invalid on its face—the *Salerno* burden—did not apply where an Establishment Clause violation was alleged, 43a-44a, and the panel, in a footnote, agreed. 7a. The district court and panel have thus carved out a special niche for Establishment Clause challenges and have drastically lowered the burden of proof which must ordinarily be met by plaintiffs before a state statute can be invalidated, not as "applied" to a concrete set of facts, but in its entirety. By rejecting the required *Salerno* methodology in a facial challenge, the district court and panel could engage in a hypothetical "worst case" analysis, which is not permitted under *Salerno* and its progeny. This rejection is inconsistent with decisions of this Court for, as Judge Jones observed, "Establishment Clause cases do not deviate from this rule of judicial restraint." 21a.[14]

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[14] In rejecting *Salerno* in Establishment Clause cases, both the district court and panel cited *Bowen v. Kendrick*, 487 U.S. 489,

Specifically, in a facial challenge to a statute, where the plaintiff seeks broadly to have a State law invalidated or enjoined in its entirety, the plaintiffs must meet a "heavy" burden and establish that there is "no set of circumstances" under which the Act could be validly utilized. *United States v. Salerno*, 481 U.S. 730, 745 (1987); *Webster v. Reproductive Health Services*, 492 U.S. at 524 (O'Connor, J., concurring); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) ("because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exist under which the Act would be valid' "); *Barnes v. State of Mississippi*, 992 F.2d 1335, 1342-1343 (5th Cir. 1993), *cert. denied*, —— U.S. ——, 126 L.Ed.2d 419 (1993). The *Salerno* burden is complementary to the salutary principles set forth at length in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348 (1938) (opinion of Brandeis, J.), that federal courts should generally proceed on a basis of narrow, case-by-case adjudication, rather than in large steps where facts may be missing or the impact of a decision difficult to measure. *See also Valley Forge*, 454 U.S. at 472.

In this case, it is unnecessary to split hairs over the precise contours of the *Salerno* burden, see Opinion of Jones J., at 21a, note 10, because a core principle of *Salerno*, as identified in Justice Kennedy's opinion in *Akron Center*, was plainly disregarded: a plaintiff does not meet his *Salerno* burden of demonstrating a statute is invalid on its face by relying upon a "worst case" analysis and hypotheticals. *Akron Center*, 497 U.S. at 514. That is exactly what the Fifth Circuit panel did here.

600-602 (1988), without discussion. However, *Bowen* does not even mention *Salerno* and does *not* reject it, either expressly or implicitly, in Establishment Clause cases. *Id.* at 600-602. The *Salerno* burden of proof is certainly not condemned in *Bowen*, and the Court's actual handling of the facial challenge in *Bowen* is *squarely consistent* with the *Salerno* methodology. *See* 487 U.S. at 613.

As observed by Judge Jones, there are a "daunting variety of activities daily undertaken on school property," 15a, and the essence of Chapter 609 is "the manifold variety of its possible constructions and applications," 22a. Under these circumstances, and given that students, as private citizens, undeniably have certain individual rights of free speech and free exercise,[15] Chapter 609 is precisely the kind of statute that cannot be, and should not have been, invalidated on its face under *Salerno*.[16]

As indicated by *Valley Forge*, Establishment Clause challenges are not somehow exempt from the normal requirements of constitutional litigation. Indeed, Establishment Clause cases, which are often "fact sensitive" [17] and may, under current jurisprudence, turn on context and factual minutia, *see, e.g., Lynch v. Donnally*, 465 U.S. 668 (1984), are exactly the type of cases to which the *Salerno* methodology should be most applicable. The Court of Appeals' exemption of an entire class of Establishment Clause litigation from the core requirements of *Salerno/Akron Center* was erroneous and warrants review by this Court.

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[15] *See, e.g., Board of Education v. Mergens*, 496 U.S. 226, 235, 247-248 (1993); *Lambs Chapel v. Center Moriches Union Free Sch. Dist.*, —— U.S. ——, 124 L.Ed.2d 352, 362-364 (1993); *Tinker v. Des Moines Ind. Sch. Dist.* 393 U.S. 503, 508-509, 512-513 (1969); *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993).

[16] Judge Jones concluded that "[i]t would be ludicrous to assert, and the panel did not attempt to do so, that there is 'no set of circumstances' under which the Mississippi prayer statute can be upheld.'" 22a. She observed that "only experience with the statute would tell whether it fulfills the premise of empowering student-initiated free speech/free exercise of religion or is misused to compel state-sponsored prayer."

[17] *See Jones II, supra*, 977 F.2d at 965.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

The issues presented in this case are important because they lie at the heart of the question of what is—and here, what is not—the proper role for federal courts in our democratic society. Will a single-minded zeal for "non-Establishment" be permitted to submerge every other constitutional limitation, right, and value? Justice Scalia, then Circuit Judge, has observed that

> [t]he degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when and* at *whose instance* they are permitted to address them.[18]

Numerous cases, both past and present, reflect and reinforce this observation.

The Court of Appeals' leap under an Establishment Clause banner to enjoin and to condemn in advance any acknowledgment of students' religious sentiments is exactly the kind of overly broad decision that the traditional Article III doctrines were meant to preclude. As pointed out by Judge Jones, "eager judicial intrusions" by the lower federal courts in this area have had deleterious effects:

> Court decrees, focused on the single goal of pure "non-establishment," supplant decisions based on compromise and consensus which reflect the multi-faceted wisdom of the people acting through democratically accountable elected officials and educators. Moreover, the accumulated precedential effect of the courts' secularizing decisions has stretched beyond each particular dispute to discourage and thwart moral and religious elements in public education. It is precisely because of the tension between adjudicative decisionmaking and well-rounded social

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[18] Scalia, *The Doctrine of Standing as an Essential Component of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 892 (1983).

policy-making that courts fashioned self-constraints on declarations of facial unconstitutionality.

26a. Given the misunderstandings and confusion engendered by current Establishment jurisprudence, the traditional requirements of a concrete, imminent, injury in fact and other elements of Article III justiciability should not be relaxed or ignored in Establishment Clause challenges; indeed, these are the very cases in which those limitations should be most vigilantly observed.

Moreover, the Court of Appeals' disregard of Article III limitations and the teachings of *Salerno* and *Akron Center* to invalidate the student-initiated prayer statute is particularly unfortunate here, where the sledgehammer of facial invalidity necessarily confuses and undermines the individual rights of third party students not before the court.[19] The Court of Appeals' opinion thus permitted a form of pre-emptive "heckler's veto" in favor of those with a secularist agenda, and the Establishment Clause has been diverted to become a tool of censorship. Petitioner respectfully submits that in a public school climate characterized by a recent dramatic increase in teenagers' drug use, and in which a loss of moral values, lack of respect for authority, and violence are all too often present, a court-sponsored message of hostility to student-initiated prayer and religious viewpoints is exactly the wrong message.

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[19] The panel's "blow struck not just the mythical ogre of state-sponsored prayer but the sincere, praiseworthy desire of students to join in prayers of their own making." Opinion of Jones, J., dissenting, 16a.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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August 29, 1996

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APPENDICES

APPENDIX A

[Republished Opinion]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-60631

DAVID INGEBRETSEN, on Behalf of himself and his daughter, ANNA INGEBRETSEN, *et al.*,
Plaintiffs-Appellees,
Appellants-Cross Appellants,

v.

JACKSON PUBLIC SCHOOL DISTRICT and THE BOARD OF TRUSTEES OF THE JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT,
Defendants-Appellees,

and

MIKE MOORE, In his official capacity as the Attorney General of the State of Mississippi,
Defendant-Appellant,
Cross Appellees,

AMELIA FREEMAN, JESSICA MASSEY and STACY SMITH,
Movants-Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

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Jan. 10, 1996

Opinion Denying Rehearing and
Rehearing En Banc May 31, 1996

Opinion Dissenting from Denial of
Rehearing En Banc Filed by
Circuit Judge Jones July 2, 1996

Before DAVIS and PARKER, Circuit Judges and BUNTON,[1] District Judge.

W. EUGENE DAVIS, Circuit Judge:

The State of Mississippi appeals the district court's decision to enjoin enforcement of a Mississippi statute allowing prayer at compulsory and noncompulsory school events. Ingebretsen cross-appeals to protest the exemption of graduation prayers from the injunction and the American Family Association Law Center ("AFALC") appeals the district court's denial of its motion to intervene. We affirm.

I.

On a wave of public sentiment and indignation over the treatment of a Principal, Dr. Bishop Knox, who allowed students to begin each school day with a prayer over the intercom, the Mississippi legislature passed the School Prayer Statute at issue here. 1994 Miss.Laws ch. 609 (Appendix A). The language at the center of this controversy is § 1(2) of the statute which reads:

> [o]n public school property, other public property or other property, invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer shall be permitted during compulsory or noncompulsory school-related student assemblies, stu-

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[1] District Judge of the Western District of Texas, sitting by designation.

> dent sporting events, graduation or commencement ceremonies and other school-related student events.

1994 Miss.Laws ch. 609, § 1(2).

The statute includes a lengthy preamble stating that it shall not be construed to violate the constitution and that its purpose is to accommodate religion and the right to free speech. The School Prayer Statute also contains a severability clause which permits any provision of the statute found to be invalid or unconstitutional to be severed without affecting the remainder of the statute. *See Id.* § 1(4), (5).

A group of parents, students, and taxpayers in the Jackson Public School District, including Ingebretsen, filed suit along with the American Civil Liberties Union of Mississippi in July of 1994 to enjoin enforcement of the School Prayer Statute on the ground that it violates the establishment clause. A motion for a preliminary injunction to preserve the status quo was filed simultaneously with the complaint.

On August 4, 1994, the district court held a hearing on Ingebretsen's motion to enjoin the defendants from implementing in any manner the School Prayer Statute. At that time, the district court also heard the motion of AFALC to intervene on behalf of certain students enrolled in Mississippi public schools. The district court decided to hold the motion for intervention in abeyance, but permitted AFALC to present argument at the hearing as amicus curiae. AFALC was instructed to re-urge its motion after the court ruled on the motion for preliminary injunction.

On August 11, 1994, one day before the start of the 1994-1995 academic year for the Mississippi public schools, the district court issued a preliminary injunction prohibiting enforcement of the School Prayer Statute. The injunction was designed to maintain the status quo until the court had full opportunity to assess each portion of

the statute separately. On August 16, 1994, the court held a supplemental hearing to determine what portion of the statute, if any, could escape the injunction by its severability clause. The court heard the testimony of Dr. Dan Merritt, Interim Superintendent of the District, and Dr. Emanuel Reeves, principal of Provine High School in Jackson, Mississippi and concluded that the provision for prayers at high school commencement exercises was the only constitutionally acceptable portion of the statute.

The district court enjoined enforcement of the statute in its entirety with the exception of the portion which permits prayers to take place at graduation ceremonies in accordance with *Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963, 972 (5th Cir.1992) (*Jones II*).

II.

Mississippi argues first that Ingebretsen does not have standing to challenge the School Prayer Statute because the statute has not yet been implemented. However, the district court found that Ingebretsen had alleged real and substantial injury which would result from the implementation of the School Prayer Statute. We agree. There is no need for Ingebretsen to wait for actual implementation of the statute and actual violations of his rights under the First Amendment where the statute "makes inappropriate government involvement in religious affairs inevitable." *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir.1981). The district court relied on the testimony of Dr. Merritt and Dr. Reeves and the enormous interest in school prayer following the suspension of Dr. Knox to conclude that implementation of the statute would inevitably lead to improper state involvement in school prayer. Under the terms of the statute, the state or its representatives will inevitably be forced to decide who prays and which prayers qualify as non-sectarian and nonproselytizing. The state will also be in the position of punishing students who attempt to leave so as to avoid hearing the prayers.

This is clearly the sort of state involvement contemplated by *Karen B.*

III.

Mississippi argues next that the district court erred in issuing the preliminary injunction. To obtain a preliminary injunction, Ingebretsen was required to show: 1) a substantial likelihood of success on the merits; 2) a substantial threat that he will suffer irreparable injury if the injunction is not issued; 3) that the threatened injury to him outweighs any damage the injunction might cause to the state and its citizens; and 4) that the injunction will not disserve the public interest. *Doe v. Duncanville Independent School Dist.* (*Doe I*), 994 F.2d 160, 163 (5th Cir.1993) (citations omitted). The district court made findings under all of these factors and concluded that the injunction was appropriate. This court will reverse the district court only upon a showing of abuse of discretion. *Id.*

A. Substantial likelihood of success

The Fifth Circuit has identified three tests that the Supreme Court has used to determine whether a government action or policy constitutes an establishment of religion. *See Jones II*, 977 F.2d 963. First, the Establishment Clause test of longest lineage: the *Lemon* test. *Lemon v. Kurtzmann*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). Under *Lemon*, a government practice is constitutional if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not excessively entangle government with religion. *Id.* Second, the Court has analyzed school-sponsored religious activity in terms of the coercive effect that the acivity has on students. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). Third, the Court has disapproved of governmental practices that appear to endorse religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 594, 109

S.Ct. 3086, 3101, 106 L.Ed.2d 472 (1989). *See also Capitol Square Review Board v. Pinette*, —— U.S. ——, ——-——, 115 S.Ct. 2440, 2452-2456, 132 L.Ed.2d 650 (1995) (O'Connor, J., concurring). The district court did not make an exhaustive analysis under each of the tests because it found that the statute was defective under any of the tests. We agree.

The School Prayer Statute fails all three prongs of the *Lemon* test because its purpose is to advance prayer in public schools, its effect is to advance religion in the schools and it excessively entangles the government with religion. The legislature declared that its purpose in enacting the School Prayer Statute was "to accommodate the free exercise of religious rights of its student citizens in the public schools." 1994 Miss. Laws ch. 609 § 1(1). This statement of purpose cannot be characterized as "secular" because its clear intent is to inform students, teachers and school administrators that they can pray at any school event so long as a student "initiates" the prayer (ostensibly by suggesting that a prayer be given). Further, when we view this statute along with this same legislature's resolution commending Dr. Knox for his "unswerving dedication to prayer in public schools," and in the context of the uproar over Dr. Knox's treatment after allowing prayer in his school, the conclusion that the School Prayer Statute was intended to advance religion becomes unavoidable. Returning prayer to public schools is not a secular purpose.

The statute's effect is to advance religion over irreligion because it gives a preferential, exceptional benefit to religion that it does not extend to anything else. *See Herdahl v. Pontotoc County School District*, 887 F.Supp. 902, 908-09 (N.D.Miss.1995) (school policy of turning public address system over to religious club for morning invocation and scripture reading has primary effect of advancing religion). Students are required by law to attend school and a state policy of prayer at school tells students that the state wants them to pray.

The final prong of *Lemon* is also violated by the School Prayer Statute because representatives of the government are allowed to lead students in prayer and punish students who leave class or assemblies in order to avoid listening to a prayer. The statute will inevitably involve school officials in determining which prayers are "nonsectarian and nonproselytizing" and in determing who gets to say the prayer at each event. To the extent that school administrators participate in prayers in their official capacity or review the content of prayers to ensure that they meet these requirements, the School Prayer Statute excessively entangles government with religion.[2]

The School Prayer Statute is also unconstitutional under the "coercion test" of *Lee*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). The statute would allow prayers to be given by any person, including teachers, school administrators and clergy at school functions where attendance is compulsory. 1994 Miss.Laws ch. 609 § 1(2). The coercion here is even greater than that in *Lee* where students had the option of not attending the graduation ceremony where the challenged prayer was offered. Here, students will be a captive audience that cannot leave without being punished by the state or School Board for truancy or excessive absences.

This brings us to the final test: the endorsement test. Government unconstitutionally endorses religion whenever it appears to " 'take a position on questions of religious belief,' " or makes " 'adherence to a religion relevant in any way to a person's standing in the political commu-

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[2] The Attorney General also argues that Ingebretsen has not met his burden of showing that the statute is facially invalid. However, in establishment clause cases facial attacks are considered under the *Lemon* test and the Supreme Court has refused to draw distinctions between facial and "as applied" attacks. *See Bowen v. Kendrick*, 487 U.S. 589, 601-02, 108 S.Ct. 2562, 2569-70, 101 L.Ed.2d 520 (1988); *Edwards v. Aguillard*, 482 U.S. 578, 581, 583, 107 S.Ct. 2573, 2576-77, 96 L.Ed.2d 510 (1987). The above discussion demonstrates the invalidity of this statute under *Lemon*.

nity,'" *Allegheny*, 492 U.S. at 594, 109 S.Ct. at 3101 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 1366, 79 L.Ed.2d 604 (1984)). The government creates this appearance when it conveys a message that religion is "favored," "preferred," or "promoted" over other beliefs. *Allegheny*, 492 U.S. at 593, 109 S.Ct. at 3100-01. The School Prayer Statute is an unconstitutional endorsement of religion because it allows school officials in their capacity as representatives of the state to lead students in prayer and sets aside special time for prayer that it does not set aside for anything else. It also places the coercive power of the state in the position of forcing students to attend school and then forcing them to listen to prayers offered there.

Under any of these tests, the District Court's determination that Ingebretsen had shown a substantial likelihood of prevailing on the merits was not an abuse of discretion.

B. A substantial threat of irreparable injury

Ingebretsen has shown that the School Prayer Statute represents a substantial threat to his First Amendment rights. *Doe I*, 994 F.2d at 166. Loss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976).

C. The threatened injury outweighs any damage the injunction might cause to Mississippi and its citizens

The only harm asserted by the Attorney General is that the injunction would have a chilling effect on students who would like to pray at school. However, the court correctly held that the injunction affected only the School Prayer Statute and would not affect students' existing rights to the free exercise of religion and free speech. Therefore, students continue to have exactly the same constitutional right to pray as they had before the statute was enjoined. They can pray silently or in a non-disruptive

manner whenever and wherever they want, *Wallace v. Jaffree*, 472 U.S. 38, 67, 105 S.Ct. 2479, 2495, 86 L.Ed.2d 29 (1985) (O'Connor concurring), in groups before or after school or in any limited open forum created by the school. *See Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 240, 110 S.Ct. 2356, 2366, 110 L.Ed.2d 191 (1990).

D. The injunction will not disserve the public interest.

The School Prayer Statute is unconstitutional so the public interest was not disserved by an injunction preventing its implementation.

All four requirements of a preliminary injunction were properly met. The district court did not abuse its discretion in determining that a preliminary injunction was warranted.

IV.

We decline Ingebretsen's invitation to reconsider our holding in *Jones II* which allows students to choose to solemnize their graduation ceremonies with a student-initiated, non-proselytizing and non-sectarian prayer given by a student. 977 F.2d at 965 n. 1. To the extent the School Prayer Statute allows students to choose to pray at high school graduation to solemnize that once-in-a-lifetime event, we find it constitutionally sound under *Jones II*.

V.

Finally, the Proposed Intervenors and the Attorney General assert that the Proposed Intervenors should have been allowed to intervene as of right under Rule 24(a)(2) or permissively under Rule 24(b). Fed.R.Civ.Proc. 24 (West 1995). The district court denied the application to intervene as of right solely on the ground that the Proposed Intervenors' interests were already adequately represented by the Attorney General and we review that determination *de novo*. The Proposed Intervenors and the Attorney General claim that the denial was error and that

intervention was necessary to allow the Proposed Intervenors to assert their constitutionally protected rights of free exercise of religion and free speech. However, the only issue before the court is the validity of the School Prayer Statute and the Attorney General, in defending that statute, can assert the rights of all Mississippians affected by the law, including the Free Exercise rights of the Proposed Intervenors. The Attorney General undoubtedly affords the Proposed Intervenors' interests adequate representation.

The denial of permissive intervention was also appropriate because the Proposed Intervenors bring no new issues to this action. The abuse of discretion standard of review for such a denial is "exceedingly deferential" to the district court, and "this circuit has never reversed a denial of permissive intervention." *Doe I*, 994 F.2d at 168 n. 10 (citation omitted). The district court's conclusion that the Proposed Intervenors would bring only delay to this action was not plain error.

Conclusion

The district court did not abuse its discretion in preliminarily enjoining the enforcement of the School Prayer Statute. Ingebretsen's claim showed a substantial likelihood of success on the merits, irreparable harm, more harm from the new law than from the injunction and that the injunction served the public interest. The district court also decided correctly to deny intervention on the ground that the Proposed Intervenors are adequately represented by the Attorney General. The Attorney General's argument for the statute on appeal is grounded almost entirely on the First Amendment rights of students. The Proposed Intervenors do not assert that students have any rights that the Attorney General has not also asserted in support of the statute. The district court's denial of permissive intervention was proper for the same reasons: Proposed Intervenors would add nothing to this action except additional parties.

For these reasons, the district court's orders enjoining the enforcement of the School Prayer Statute except as to nonsectarian, nonproselytizing student initiated voluntary prayer at high school commencement as condoned by *Jones II* and denying AFALC's motion for intervention are AFFIRMED.

AFFIRMED

ON SUGGESTION FOR REHEARING
EN BANC

May 31, 1996

Before DAVIS and PARKER, Circuit Judges, and BUNTON,* District Judge.

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

For reasons to be assigned, Circuit Judge EDITH H. JONES dissents from refusal to grant rehearing en banc.

Circuit JUDGE GARWOOD and Circuit Judge PATRICK E. HIGGINBOTHAM did not participate in the consideration of the suggestion for rehearing en banc.

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* District Judge of the Western District of Texas, sitting by designation.

DISSENT FROM DENIAL OF REHEARING EN BANC

EDITH H. JONES, Circuit Judge, with whom E. GRADY JOLLY, JERRY E. SMITH, RHESA HAWKINS BARKSDALE, EMILIO M. GARZA and DeMOSS, Circuit Judges, join, dissenting:

The First Amendment says Congress shall make no law respecting an establishment of religion, and under Supreme Court rulings, the Amendment has come to mean that states shall make no such laws. The First Amendment, in other words, limits government action that creates an establishment of religion. But the Supreme Court has never held that *students* may not express their *private* religious convictions by means of appropriate voluntary prayer in school. In overturning the Mississippi school prayer statute, leaving a sliver of liberty for student-initiated graduation ceremony prayers, the Fifth Circuit has transformed the Establishment Clause from a shield against government religious indoctrination to a sword attacking personal religious behavior.

Just as unfortunate as the court's invasion of civil liberty is its misapplication of traditional doctrines of judicial restraint to achieve that result. The court had no warrant either to adjudicate a case in which plaintiffs have not been injured and cannot assert a justiciable controversy, or to decide the facial constitutionality of this statute. Sadly, this exercise of judicial boldness may be explained, though it cannot be justified, by the lack of guidance from the Supreme Court's Establishment Clause jurisprudence. The Court's decisions in this area more closely resemble *ad hoc* Delphic pronouncements than models of guiding legal principle. It is no wonder lower courts and the public are led adrift and astray. Religious liberty has invariably been the victim of the uncertainty. From the Fifth Circuit's refusal to rehear this case *en banc*, I respectfully dissent.

I. *The Statute and its Treatment by the Panel*

The Mississippi School Prayer Statute aimed at enabling the conduct of voluntary, student-initiated prayer in connection with public schooling. The statute states as its purpose:

> . . . to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution, to define for the citizens of Mississippi the rights and privileges that are accorded them on public school property, other public property or other property at school-related events; and to provide guidance to public school officials on the rights and requirements of law that they must apply. The intent and purpose of the Legislature is to accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as provided to them by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

1994 Miss.Laws Ch. 609, § 1(1). Without otherwise limiting the free exercise of religion and speech (Section 1(3)), the statute permits:

> [o]n public school property, other public property or other property, invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer . . . during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events.

The statute disclaims state support, approval or sanction of any prayer or similar activity that occurs on public property, and it disavows the promotion or establishment of any religion or religious belief. *Id.* at § 1(4). A severability clause seeks to protect the bulk of the statute to

the extent any of its provisions is held invalid or unconstitutional. Id. at § 1(5).

There is no doubt of the breadth of this statute, and notwithstanding its disclaimer, the vulnerability of some of its aspects to constitutional challenge. Whether, for instance, participation in student-initiated prayer could be imposed on unwilling students in a "compulsory" setting may be dubious. *Compare Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). But to admit a potential for unconstitutional application is not to condemn the entire statute.

Any simplistic description of the statute's operation is belied by the daunting variety of activities daily undertaken on school property. Students gather before, during and after school, at lunch, in activity rooms or on the field, for all sorts of curricular, extracurricular and quasi-curricular events. Testimony in this case listed a few of the types of assemblies alone: scholastic achievement assemblies, beauty pageants, guest speakers, programs, athletics, matters initiated by students, PTA, civic clubs, Boy Scouts, pep rallies. Precisely because the initiation of voluntary student prayer rests with students rather than school administrators, and because federal courts never permitted the law to take effect, there was no evidence in the district court as to how or when the statute might be invoked.

Rather than admit that construing this statute depends upon private, not state action, the Fifth Circuit found guilt by mischaracterization. Relying on conclusional statements of school officials and the "enormous interest in prayer" related to the Bishop Knox suspension,[1] the court declares, "[i]mplementation of the statute would inevit-

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[1] Bishop Knox was the school principal who was briefly suspended for allowing students to recite a brief morning prayer over the intercom. The case received national press attention and created a big stir in Jackson.

ably lead to improper state involvement in school prayer" and would require school officials "to decide who prays" and to monitor prayers' content. *Ingebretsen v. Jackson Public School District*, —— F.3d ——, ——, 1996 WL 205, *2 (5th Cir.1996). The court assumes that prayers may even be given by teachers, administrators or clergy, that attendance will be compulsory and non-attendants punished. *Id.* at ——, 1996 WL 205, *3. These conclusions are not based on any facts but solely on predictions and hypotheticals spawned by a broadly drafted statute.

Once the panel accepted this mistaken impression of state control over the prayers, its result was predictable. The panel deployed three "tests" that the Supreme Court has used ot determine the parameters of the Establishment Clause. Although one of these tests has been repeadely discredited but not overruled,[2] and the other two have never been fully adopted or explained,[3] they were deemed sufficient ot the panel's task of holding th school prayer statute *qua* "state prayer statute" unconstitutional.[4] Unfortunately, its blow struck not just the mythical ogre of state-sponsored prayer but the sincere, praiseworthy desire of students to join in prayers of their own making.

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[2] See the "*Lemon* test," from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 21 L.Ed.2d 745 (1971), nominally applied in *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 395 & n. 7, 113 S.Ct. 2141, 2148 & n. 7, 124 L.Ed.2d 352 (1993). Justice Scalia noted in a separate *Lamb's Chapel* opinion that six members of the Supreme Court as of 1993 had seriously critized *Lemon*. *Id.* at 398, 1135 S.Ct. at 2150 (Scalia, J., concurring in judgment).

[3] The panel referred to the "coercion test," *Lee v. Weisman*, *supra*, and the "endorsement test," *County of Allegheny v. ACLU*, 492 U.S. 573, 594, 109 S.Ct. 3086, 3100-3101, 106 L.Ed.2d 472 (1989).

[4] If it were necessary, I would take issue with the panel's interpretation of the Supreme Court's establishment clause "tests". Criticizing the substance of this decision is beside the point, however, because as explained above, the panel should never have reached difficult substantive establishment clause issues.

II. *Case or Controversy Limits—Standing/Ripeness*

The panel first went wrong by concluding that the plaintiffs had standing to sue to invalidate the school prayer statute. Standing is the Article III case or controversy requirement that a plaintiff assert injury in order to sue in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The doctrine of standing implements a fundamental principal of judicial restraint.[5] As Justice Powell observed, "relaxation of standing requirements is directly related to the expansion of judicial power." *United States v. Richardson*, 418 U.S. 166, 188, 94 S.Ct. 2940, 2952, 41 L.Ed.2d 678 (1974) (Powell, J., concurring).

A court's decisions are hypothetical or advisory if a case presents no injury to repair. Dispense with injury, and judges may be advisors or revisers of the legislature, but they are no longer deciding live cases or controversies. Their role has expanded, their jurisdiction has drastically increased if the standing requirement diminishes.

In three ways, one could assert "injury" to the plaintiffs who sued to invalidate the Mississippi school prayer statute. Although neither the plaintiffs nor the court relied on two of the assertions, they illuminate the evanescence of the notion of injury employed by the court.

First, some of the plaintiffs are parents and students in Jackson, Mississippi public schools. Status alone, however, hardly connotes injury.[6] A plaintiff must be so situ-

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[5] *See, e.g., Society of Separationists v. Herman*, 959 F.2d 1283 (5th Cir.) (en banc) (Higginbotham, J.), *cert. denied* 506 U.S. 866, 113 S.Ct. 191, 121 L.Ed.2d 135 (1992); *National Treasury Employees Union v. Department of Treasury*, 25 F.3d 237, 240-41 (5th Cir.1994); *Henschen v. City of Houston*, 959 F.2d 584 (5th Cir.1992).

[6] There is a doctrine of taxpayer standing in Establishment Clause cases, *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), but that is not at issue here.

ated to the constitutional violation as to have suffered real and immediate injury, traceable to the defendant's conduct.[7] In consequence, no parent ought to be allowed to sue over a school policy with which he disagrees unless the policy has demonstrably injured him or his child. Recognizing the frailty of this position, plaintiffs did not assert that their status alone conferred standing.

Second, the panel found standing because the statute makes "inappropriate government involvement in religious affairs inevitable." *Ingebretsen*, —— F.3d at ——, 1996 WL 205, *1 (*quoting Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir.1981), *affirmed*, 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982)). Inevitability, like status, may suggest incipient injury, but it does not reflect an extant fact of injury. Moreover, this conclusion of inevitability reflects the panel's confusion of student-initiated prayers with state-controlled prayers. The Mississippi prayer statute authorizes but does not compel voluntary student-initiated prayer, and it expressly provides that it is to be construed consistent with First Amendment law. It is impossible to predict when or how the statute might be invoked by students. Because the statute never went in effect, no one testified how students would react to it. The school district had set no policies for its implementation, although contrary to the panel's earlier assertion, the district already forbade teachers from leading or organizing prayers and would not compel dissenting students to remain present.

Refuting both the status theory and inevitability theory of injury, this court has held that a plaintiff who was not an elementary student in a public school district could not attack the district's alleged policy authorizing Gideon Bible distribution in elementary schools. *Doe v. Duncan-*

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[7] *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, 502 U.S. 907, 112 S.Ct. 298, 116 L.Ed.2d 242 (1991).

ville ISD, II, 70 F.3d 402 (5th Cir.1995).[8] Standing is not ordinarily, and is certainly not in this case, an arcane concept. The panel's fear that national publicity surrounding the Bishop Knox controversy would inspire a proliferation of student prayers under the new statute may or may not be valid, but fear of exposure to student-initiated prayers in the future is simply not injury.[9]

A third concept of standing, previously articulated only in First Amendment free speech cases, attributes injury to a plaintiff's allegation that he intends to engage in protected speech or expressive conduct that may violate a statute. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). Relatedly, he may assert he is injured because the existence of the allegedly unconstitutional ordinance deters or chills the exercise of free speech rights and causes either continuing harm or a real and immediate threat of future injury. For obvious reasons, plaintiffs asserted neither type of injury in this case. Their free speech rights were unaffected by a policy that allows voluntary, student-initiated speech which happens to be prayerful.

On the contrary, the real chilling effect of the federal court's injunction falls upon students who have now been

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[8] *See also, O'Hair v. Hill*, 641 F.2d 307, 310 (5th Cir.1981) (without suffering actual injury, plaintiffs had no standing to make a First Amendment challenge to a provision of the Texas Constitution).

[9] The panel supported its "inevitability" theory of injury by relying on *Karen B. v. Treen*, 653 F.2d 897 (5th Cir.1981), *affirmed*, 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982), but that is an entirely different case. In *Karen B.*, teachers were authorized to seek volunteers to pray in regular classes every day and failing any volunteers to offer prayer themselves; they were also required to monitor the prayers. *Id.* at 902. Thus, the existence of prayer sponsored by the *school* was a foregone conclusion. Here, whether prayers will occur at all depends not on the school but on student, i.e. private initiative. The nature and form of prayer requests is no more foreseeable than requests by FFA or Junior Achievement to speak at school assemblies or over the public address system.

deterred from exercising their constitutional rights of free speech, assembly and religious practice in conjunction with school events.

One other way to look at the justiciability of this case is to say that the controversy is not ripe until allegedly unconstitutional regulations are promulgated under the statute or unconstitutional prayer occurs or is actually scheduled to occur. *See* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532.1 (1984) (ripeness serves "the central perception . . . that courts should not render decisions absent a genuine need to resolve a real dispute"). The court was unwilling to let events take their course under the statute and trust to the good will of students and school administrators to implement it properly.

Whether the panel reached the "right" decision on some imagined exegesis of the statute is not the issue for justiciability purposes. Rather, the question is whether these plaintiffs suffered or are in imminent danger of themselves suffering injury from the mere existence of the statute, as opposed to its particular application in the future. These plaintiffs did not sufficiently demonstrate injury. The case did not present a factual, specific dispute. The court thus acted as advisor or reviser, not as adjudicator, and rendered its decision based on a wholly hypothetical, "worst-case" scenario about the application of the statute.

III. *Standard of Facial Invalidity*

As it treated the question of standing, so the panel summarily opted for the jurisprudential approach of striking down the Mississippi school prayer statute on its face, *in toto*, rather than deferring a constitutional law decision until the statute has actually been applied. Facial constitutionality analysis was justified in a footnote with two citations. *Ingebretson*, —— F.3d at —— n. 2, 1996 WL 205, *5 n. 2. In my view, this technique misfires because plaintiffs cannot plausibly maintain that there is

"no set of circumstances" under which the statute may be constitutionally applied

The reasons for a distinction between facial and "as applied" challenges—and for a court's disavowing promiscuous declarations of facial invalidity—some obvious. Courts owe heavy deference to legislative enactments and to the presumption that legislators can independently gauge their constitutionality. The doctrine of facial invalidity obtains where no narrowing construction of a statute can save it. *United States v. Salerno*, 481 U.S. 739, 744, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). In First Amendment free speech cases, declarations of facial invalidity have been more frequent, although still imposed cautiously, because of the chilling effect such laws might have on free expression, an effect not claimed by plaintiffs here. *Id.* Even in an abortion case, this court has refused to declare a statute facially unconstitutional. *Barnes v. Mississippi*, 992 F2d. 1335, 1342 (5th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 468, 126 L.Ed.2d 419 (1993).[10]

Establishment Clause cases do not deviate from this rule of judicial restraint. There is precedent for both facial and as-applied challenges to statutes on Establishment Clause grounds, but the Supreme Court has acknowledged that it has not delineated the consequences of those two approaches. *Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S.Ct. 2562, 2570, 101 L.Ed.2d 520 (1988). *Bowen*, however, upheld on its face the Adolescent Family Life Act, which permitted federal funding of religious organizations for adolescent sexual counsel-

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[10] *But compare Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied, Janklow v. Planned Parenthood, Sioux Falls Clinic*, —— U.S. ——, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996) (holding *contra Barnes* and Justice Stevens's concurrence to the denial of certiorari in *Janklow v. Planned Parenthood, Sioux Falls Clinic*, —— U.S. ——, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996), with Justice Scalia's dissent from denial of certiorari in that case. *Id.*

ing. The Court remanded for a more discriminating consideration of the statute's validity as applied. Significantly, in other cases where the Court has held statutes facially to represent an unconstitutional establishment, there was no room for a narrowing construction; each such statute dictated the state's unconstitutional involvement with religion.[11]

In contrast with statutes susceptible to no narrowing construction, the essence of the School Prayer Statute, even more than in *Bowen*, is the manifold variety of its possible constructions and applications. The amount and type of state involvement with voluntary student prayer is unforeseeable because invocation of the statute depends not on the state but on private students. It would be ludicrous to assert, and the panel did not attempt to do so, that there "is no set of circumstances" under which the Mississippi prayer statute can be upheld. *Salerno, supra.* In fact, the court conceded the statute's validity as applied to graduation prayers pursuant to *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir.1992), cert. denied, 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993), and it must be constitutional to facilitate student prayer as permitted in *Doe v. Duncanville II, supra.*

Critically, holding the statute no facially invalid or deferring consideration of facial validity is a different matter than facially upholding it across the board in every possible way. Only experience with the statute would tell whether it fulfills the promise of empowering student-initiated free speech/free exercise of religion or is misused to compel state-sponsored prayer. The panel's decision to strike down the entire statute preemptively expanded its authority at the expense of the legislature and

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[11] *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (holding Louisiana "Creationism Act" facially invalid); *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985).

unwarrantedly limited the legislature's flexibility to run Mississippi's schools.

IV. *Why This Case Matters*

This case matters because it breaches the limits of judicial authority to achieve results that are offensive to religious liberty and the sound upbringing of our children. The panel's departures from standard rules of judicial restraint have been explained above. It has long been thought prudent, indeed obligatory, for a court to avoid discussing difficult but unnecessary constitutional issues. *Spector Motor Services, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 164, 89 L.Ed.101 (1944). Here, neither plaintiffs' lack of standing nor trepidation over a premature declaration of facial invalidity persuaded the panel to forebear.

But beyond the errors of judicial craft lies a deeper significance. The panel's decision is the latest in a long line of cases whose inevitable consequence has been to remake society in a secular image. Two examples suffice: courts have held that the mere existence of a Good Friday holiday "establishes" the Christian religion,[12] and the venerable inscription on a courthouse "The World Needs God" likewise constitutionally offends . . . someone.[13] Only by recognizing the absurdity of holding otherwise have courts allowed us still to pledge that we are "one nation under God, indivisible" and to maintain "In God We Trust" on the currency. When our cultural heritage and tradition, indeed the three-millennial history of the Western world threatens to be erased by three decades of federal court pronouncements, something is amiss.[14] As

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[12] *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995).

[13] *Doe v. County of Montgomery, IL.*, 41 F.3d 1156 (7th Cir. 1994).

[14] The inconsistency in application of the establishment clause filters down to the parchment commissions for Article III judges, each of which was signed "In the Year of Our Lord."

Prof. Stephen Carter arrestingly concluded, our elite cultural institutions, including federal courts, have imposed on us an historically unpresented "culture of disbelief." [15]

The elites' tin ear for religious belief and practice has been particularly evident in cases regarding the public schools. Federal courts often seem unable to draw fundamental distinction between school-sponsored religious "establishment" and benign teaching about religion or, as in this case, students' constitutionally protected free exercise of speech and religion.[16] School officials, averse to the emotional and financial costs of litigation, have systematically excised religious references from school curricula and activities in response to the caselaw. This widespread Establishment Clause misconstruction occurs notwithstanding that Supreme Court justices have repeatedly acknowledged the importance of teaching about religion in public schools [17] and that no Supreme Court authority limits students' nondisruptive religious self-expression. Not to belabor the point, I note that Congress

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[15] Stephen L. Carter, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

[16] *See, e.g., Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir.1993) (appeals court overturns lower court decision prohibiting eighth grade student from distributing religious pamphlets); *Mozert v. Hawkins County Bd. Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1029, 98 L.Ed.2d 993 (1988) (parents may not remove children from class with religiously offensive reading materials); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 518, 133 L.Ed.2d 426 (1995); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 876 F.Supp. 445 (E.D.N.Y.1995) (student Bible club could not reject non-believers as officers), *aff'd in part and rev'd in part*, 85 F.3d 839 (2d Cir.1996) (appeals court overturns lower court decision holding that student Bible club could not reject non-believers as officers).

[17] *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *School Dist. of Abington Township, PA. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

passed and the Supreme Court upheld the Equal Access Act, a law guaranteeing students' rights to meet in religious clubs on public school property, in order to overturn lower federal court decisions to the contrary.[18] Only last summer, President Clinton spoke of the problem of hostility to religion in public schools and instructed the Departments of Justice and Education to formulate guidelines for the protection of public school students' religious speech and conduct.[19] Every time a federal court writes an unduly broad Establishment Clause decision concerning public schools, we encourage further misunderstandings, to the detriment of students' constitutional rights and the goal of teaching about religion in public schools.

The courts' broad decisions in this area are not only in my view, uncompelled by precedent, they are also extraordinarily short-sighted. Decisions fostering rigidly secular public education strip school officials of moral tools that lie at the heart of the educational process. As the Rev. Martin Luther King explained:

> The function of education, therefore, is to teach one to think intensively and to think critically. But education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason but with no morals.

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[18] Equal Access Act, 20 U.S.C. §§ 4071-4074; *Board of Education v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990).

[19] *See* President's Directive to the Education Dept., and News Release of U.S. Dept. of Education, Aug. 17, 1995. The Directive states that the President "share[s] the concern and frustration that many Americans feel about situations where the protections accorded by the First Amendment are not recognized or understood." President Clinton instructed the Department of Justice and Education "to provide school officials with guidance [concerning] the extent to which religious expression and activities are permitted in public schools."

> We must remember that intelligence is not enough. Intelligence plus character—that is the goal of true education.

THE WORDS OF MARTIN LUTHER KING, JR. 41 (ed. Coretta Scott King) (1993). Character education, whose roots lie deepest and firmest in precepts of religious morality, has been the ultimate casualty of the courts' careless Establishment Clause jurisprudence.

Eager judicial intrusions into the educational process have also spawned decrees that inhibit school leaders' flexibility to accommodate varying social conditions. Intuitively, it appears that different approaches are required to encourage educational success, including character building success, in a Chicago ghetto, a Dallas suburb or a small Tennessee town. Yet local control of schools, a cornerstone of American public education, has had to give way to a growing body of federalized, nationally binding Establishment Clause jurisprudence.

Paraphrasing George Orwell, we have sunk to the point at which it becomes one's duty to restate the obvious. What seems obvious to me is that disputes like these, deeply enmeshed in social and political policy, are not well handled by the adjudication process. Court decrees, focused on the single goal of pure "non-establishment," supplant decisions based on compromise and consensus which reflect the multifaceted wisdom of the people acting through democratically accountable elected officials and educators. Moreover, the accumulated precedential effect of the courts' secularizing decisions has stretched beyond each particular dispute to discourage and thwart moral and religious elements in public education.[20] It is precisely because of the tension between adjudicative decision-making and well-rounded social policy-making that courts

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[20] *Jones v. Clear Creek ISD, supra,* authorizing voluntary, student-initiated graduation prayer; *Doe v. Duncanville ISD, II, supra* authorizing voluntary student sports prayers.

fashion self-constraints on declarations of facial unconstitutionality. It is because the Founders recognized the distinction between mere adjudication and lawmaking that Article III requires a real case or controversy, implicating standing to sue, ripeness and justiciability. A forthright sense of judicial modesty also compels such limitations on the judicial process. Neither judicial modesty nor principles of judicial restraint have been notably evident in decisions involving religion and the public schools.

This case, striking down Mississippi's attempt to accommodate students' desire—and constitutional right—voluntarily to pray aloud at school, is a paradigm of the errors that bedevil Establishment Clause jurisprudence. The court reached out to condemn the entire statute on its face even though no plaintiff had been injured or could realistically assert standing, and even though certain constitutional applications of it are mandated by our caselaw. The court's decision was premised not on actual facts but upon a hypothetical, worst-case application of the statute. The court dealt unsympathetically, to say the least, with the motivation for the statute, a motivation shared by the vast majority of the American people that life is more meaningful, education more dignified, morality fortified when voluntary, student-initiated prayer is permitted. It was not the court's prerogative under traditional principles of judicial restraint to strike down this statute. I DISSENT from the denial of rehearing *en banc*.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
JACKSON DIVISION

No. 3:94-cv-411WS

DAVID INGEBRETSEN, On Behalf of Himself and His Daughter, ANNA INGEBRETSEN; BERLENA MCCALLUM, On Behalf of Herself and Her Son, JOHN M. DOZIER, THE REV. DR. DONALD BELL, On Behalf of Himself and His Daughter, KATHRYN DIANA BELL; WILLIAM D. LAMSON, On Behalf of Himself and His Daughter, LEIGH LAMSON QUAY; TERRY BACOLA, On Behalf of Herself and Her Sons, BRIAN BACOLA and DARREN BACOLA; ROBERT S. MCGOWAN; JARUSHA DEGROOTE; JOHN BAKER; AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC.,

Plaintiffs,

v.

THE JACKSON PUBLIC SCHOOL DISTRICT; BOARD OF TRUSTEES OF THE JACKSON PUBLIC SCHOOL DISTRICT, By and Through Its President, MARK BAILEY; and MIKE MOORE, In His Official Capacity as THE ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI,

Defendants.

Sept. 2, 1994

MEMORANDUM OPINION AND ORDER

WINGATE, District Judge.

Before the court is the plaintiffs' motion for preliminary injunction which seeks to enjoin the enforcement of Mis-

sissippi's school-prayer statute, 1994 Miss.Laws ch. 609, §§ 1 to 3 (codified as amended at Miss.Code Ann. §§ 37-13-4 & 37-13-4.1 (rev. 1990)). This statute purports to permit public-school students to initiate prayer at various compulsory and noncompulsory school events. The defendants have filed a motion to dismiss or, alternatively, for summary judgment on the grounds, *inter alia*, that this lawsuit does not present a "case" or "controversy" within the meaning of Article III [1] of the United States Constitution, and further that the plaintiffs have not suffered an injury of a character that should invoke the jurisdiction of this court.

The interrogatory here is whether the plaintiffs herein are entitled to injunctive relief under the dictates of *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567 (5th Cir.1974), upon plaintiffs' assertion that the school-prayer statute *sub judice* is in conflict with the Establishment Clause [2] of the First Amendment to the United States Constitution and its interpreting cases.

Although this debate is generally framed by concerns of whether prayer in the public schools would complement or boost secular learning and character development, today's ruling makes no reference to these matters. Nor does this case decide whether prayer in the public schools would stem the tide of juvenile unlawfulness and immorality which many claim is on the upsurge. Rather, the focus here is simply on the language of the school-prayer statute and whether it survives the requisites of *Canal Auth. of State of Fla. v. Callaway, supra*, at 572. Earlier, this court in a preliminary ruling immediately determined that at least one aspect of the school-prayer

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[1] U.S. Const. art. III, § 2, cl. 1 provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .

[2] U.S. Const. amend. I provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;
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> . . . .

statute appears to offend the Establishment Clause.[3] Since the statute contains a severability clause, this court then sought to determine whether to enjoin but portions of the statute, or whether to enjoin it in toto. During this subsequent hearing, held on August 16, 1994, the plaintiffs presented live testimony, and both parties introduced documentary exhibits. The court then heard oral arguments on the facts and the law. Sufficiently educated in all of the particulars, this court now renders its ruling.

I. PARTIES AND JURISDICTION

The plaintiffs represent three distinct classes of persons: (1) students currently enrolled in the Jackson, Mississippi, Public Schools; (2) parents of those students, in their capacities as both parents and taxpayers; and (3) the American Civil Liberties Union ("ACLU"), a non-profit membership organization of the State of Mississippi. The ACLU appears as a plaintiff on its own behalf and on behalf of its members and their minor children. The defendants here are: (1) the Jackson, Mississippi, Public School District ("District"); (2) the Board of Trustees of the Jackson Public School District ("School Board"), by and through its president, Mark Bailey; and (3) Mike Moore, in his official capacity as the Attorney General of the State of Mississippi.

This case is properly before this court pursuant to federal question jurisdiction, 28 U.S.C. § 1331,[4] and civil rights jurisdiction, 28 U.S.C. § 1343.[5]

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[3] *See* Memorandum Opinion and Order, Civil Action No. 3:94-cv-411WS (S.D.Miss. Aug. 11, 1994) (Wingate, J.). *See also* section on Invocations and Benedictions in this opinion.

[4] 28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil cases arising under the Constitution, laws, or treaties of the United States.

[5] 28 U.S.C. § 1343(a)(3) provides:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any

II. FACTS[6] AND PROCEDURE

In response to a request by the majority of the student body at Wingfield High School in Jackson, Mississippi, the school's principal, Dr. Bishop Earl Knox, permitted[7] the student body president to deliver a prayer over the school intercom system on the morning of November 9, 1993. The student body had previously voted 490 to 96 to permit such a prayer. Although earlier advised by the District's attorney that such a practice was condemned by the United States Constitution and, thus, by the District's policy, Dr. Knox nevertheless permitted the prayer. Over the next three days the prayers were delivered over the school intercom system to all students who, during which, were required to remain at their desks.

On November 11, 1993, Dr. Knox was summoned to meet with his immediate supervisor, Deputy Superintendent John Sanders, and was placed on administrative leave for allowing the students to offer the morning prayers.

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person: (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

[6] The facts are derived primarily from stipulations by the parties and exhibits received into evidence during the supplemental preliminary injunction hearing. *See Order*, No. 3:94-cv-411WS (S.D. Miss. Sept. 2, 1994) (Wingate, J.).

[7] When Dr. Knox first received the students' request or became aware of the support for such, he requested an opinion from the Jackson Public School District Attorney, JoAnne Nelson, as to whether his students could begin each day with the announcement of a nonsectarian, nonproselytizing prayer over the intercom if the student body voted on such a practice and the prayer was led by a student volunteer. By memorandum to Dr. Knox dated November 10, 1993, Ms. Nelson concluded that this practice was not permitted by the United States Constitution and, thus, was prohibited by the Jackson Public School District Policy. *See* Pls.Ex. 16.

On November 24, 1993, the District's Superintendent, Dr. Benjamin Canada, terminated Dr. Knox's employment.

Dr. Knox subsequently contested his termination and requested an evidentiary hearing.[8] In due course, Dr. Knox appeared before Hearing Officer Dr. Dan Merritt, whose task was to determine whether Dr. Knox's actions, taken in spite of the disapproval of the District's attorney,[9] constituted insubordination—a ground for dismissal under Miss.Code Ann. § 37-9-59.[10] The Hearing Officer found on the evidence presented that Dr. Knox's actions had been insubordinate.

On December 15, 1993, instead of ratifying either the termination or the aforementioned ground for such, the School Board voted to suspend Dr. Knox's employment until July 1, 1994, on the grounds that he had shown "lack of professional judgment." Still aggrieved, Dr. Knox appealed that suspension to the Chancery Court of the

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[8] Pursuant to Miss.Code Ann. § 37-9-59 (1972), before a principal or teacher may be suspended or removed, he/she must be informed that he/she is entitled to a public hearing. Under § 37-9-111(2) (1972), the principal or teacher shall be allowed to "present matters at the hearing relevant to the reasons given for the nonreemployment determination and to the reasons the employee alleges to be the reasons for nonreemployment and to be represented by counsel at such a hearing."

[9] Apparently, the District's attorney was relying upon the cases of *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Meltzer v. Bd. of Public Instruction of Orange Cty.*, 577 F.2d 311 (5th Cir.1978) (en banc), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 872, 59 L.Ed.2d 56 (1979); and *Hall v. Board of School Com'rs of Conecuh County*, 656 F.2d 999 (5th Cir.1981), which all have held that morning devotionals delivered over the school's public address system are unconstitutional.

[10] Section 37-9-59 of the Miss.Code Ann. sets forth various grounds, to wit: "incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil, or other good cause" for suspending or removing principals or teachers, as well as the procedures to be followed before principals or teachers may be suspended or removed.

First Judicial District of Hinds County. By order dated April 22, 1994, Chancellor W.O. "Chet" Dillard ordered the School Board to reinstate Dr. Knox with back pay.[11]

Dr. Knox's suspension sparked considerable public debate throughout the State of Mississippi as to the proper role of prayer in the public schools. When Dr. Knox was placed on administrative leave, 299 students were suspended from public school in Jackson and surrounding areas for walking out of classrooms in protest of Dr. Knox's treatment. Several rallies were held in support of Dr. Knox and school prayer. One of the largest such rallies was held in Jackson on the steps of the state capitol and featured a supportive speech by the Governor of Mississippi, Kirk Fordice.

This public support for Dr. Knox even reached into the Mississippi Legislature. On March 24, 1994, the Mississippi Senate passed a resolution commending Dr. Knox

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[11] The School Board filed a notice of appeal from the Chancery Court's judgment on April 22, 1994. Then, the School Board filed a Motion for Stay Upon Appeal with the Chancery Court. The motion was denied by order dated April 26, 1994. Pursuant to Miss.Sup.Ct.R., 8, on April 26, 1994, the School Board filed a Motion to Stay Execution with the Mississippi Supreme Court. The School Board asked the Supreme Court to stay the Chancery Court's directives concerning Dr. Knox's reinstatement, back pay and costs, and the Chancery Court's guidelines concerning prayer. The Mississippi Supreme Court granted the School Board's Motion to Stay Execution Pending Appeal on the issues of back pay, costs, and the prayer guidelines. As to the issue of reinstatement, the Mississippi Supreme Court found that Bishop Knox should be allowed to return to work on July 1, 1994, because the School Board had failed to satisfy the requirements of the Miss.R.Civ.P. 62 which required the School Board to: (a) make a strong showing that it is likely to succeed on the merits of the appeal; (b) establish that unless a stay is granted the District will suffer irreparable injury; (c) show that no substantial harm will come to other interested parties; and (d) establish that a stay would do no harm to the public interest. *See Board of Trustees of the Jackson Pub. Sch. Dist. v. Knox*, 638 So.2d 1278 (Miss.1994) (en banc).

"for his forthright action [which] has been the catalyst for a renewed effort all over this state and nation to return prayer to our public schools: . . ." S.Con.Res. 663, 1994 Reg. Sess. Then, on March 29, 1994, the Mississippi House of Representatives passed House Bill No. 222, the subject school-prayer law, by a vote of 109 to 11. The next day House Bill No. 222 was approved by the Mississippi Senate by a vote of 31-18.

On April 7, 1994, Governor Fordice signed into law House Bill No. 222, which became effective on July 1, 1994. The entire text of the statute is reproduced in the appendix of this opinion. However, the language at the center of this controversy is § 1(2) of the school-prayer statute which states that:

> [o]n public school property, other public property or other property, invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer shall be permitted during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events.

1994 Miss.Laws ch. 609, § 1(2). The drafters of the statute included the following preamble:

> [t]he exercise of the rights guaranteed under subsection (2) of this section shall not be construed to indicate any support, approval or sanction of the contents of any such prayer, invocation, benediction or other activity, or be construed as an unconstitutional use of any public property or other property by the State of Mississippi or any agency, department, board, commission, institution or other instrumentality thereof or any political subdivision of the state, including any county or municipality and any instrumentality thereof. The exercise of these rights on public school property, other public property or other property for

> such school-related activities, by students and others, shall not be construed as the promotion or establishment of any religion or religious belief.

Id. § 1(4).

Further, the school-prayer statute contains a severability clause which permits any provision of the statute found to be invalid or unconstitutional to be severed without affecting the remainder of the statute. *See id.* § 1(5).

On August 4, 1994, this court held a hearing on plaintiffs' motion for a preliminary injunction which asked this court to enjoin the defendants from implementing in any manner the school-prayer statute. At that time, the court also heard the motion of the American Family Association Law Center ("AFALC") to intervene on behalf of certain students enrolled in Mississippi public schools. The court decided to hold the motion for intervention in abeyance, but permitted AFALC to present argument at the hearing as amicus curiae. AFALC was instructed to re-urge its motion after the court ruled on the motion for preliminary injunction.

On August 11, 1994, one day before the start of the 1994-1995 academic year for the Mississippi public schools, this court issued a preliminary injunction which enjoined the enforcement of the school-prayer statute. The injunction was designed to maintain the status quo until the court had full opportunity to assess the severability approach.

On August 16, 1994, the court held a supplemental hearing to determine what portion of the statute, if any, could escape the injunction by its severability clause. The court also listened to the testimony of Dr. Dan Merritt, Interim Superintendent of the District, and Dr. Emanuel Reeves, principal of Provine High School in Jackson, Mississippi. Both witnesses shared their experiences with respect to the issue of prayer in the District, as well as

their perspectives on potential logistical and problematical aspects of the statute's implementation. At the second hearing, the court also permitted AFALC to re-urge its motion for intervention.

III. PRELIMINARY MATTERS

A. Motion to Dismiss

The Attorney General has submitted his motion under Rules 12(b)(1), 12(b)(6),[12] and 56(b) and (c),[13] Federal Rules of Civil Procedure, to dismiss this lawsuit on the following seven proffered grounds: (1) that the court should abstain from construing the statute and, instead, should await the conclusion of state court litigation which might supply a construction; (2) that the instant complaint seeks redress of hypothetical and speculative injuries and, thus, fails to present a case or controversy as required under Article III;[14] (3) that the action challenged by the plaintiffs constitutes private action, not state

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[12] Rule 12. Defenses and Objections—When and How Presented —By Pleading or Motion—Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, rather a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; . . . (6) failure to state a claim upon which relief can be granted.

[13] Rule 56(b) of the Federal Rules of Civil Procedure provides:

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof. Rule 56(c) of the Federal Rules of Civil Procedure provides that the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[14] *See, supra*, ftn. 1.

action, therefore, the driving jurisdictional cause-of-action base, 42 U.S.C. § 1983, is not implicated; (4) that the plaintiffs have not met their burden of demonstrating that the school-prayer statute is unconstitutional on its face; (5) that existing Fifth Circuit authority amply demonstrates the facial constitutionality of the statute; (6) that the injunctive relief sought by the plaintiffs would chill the exercise of religious free speech; and (7) in the alternative, that the severance of any invalid portion of the statute would make the remainder of the statute facially constitutional. The court will address in turn these arguments under the prescribed juridical standards which govern courts in their assessment of Rules 12 and 56 motions.

In ruling on a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the court must accept as true the facts alleged in the complaint or pleadings, together with all reasonable inference therefrom, to determine whether the allegations state any basis for legal relief. *See Benton v. U.S.*, 960 F.2d 19 (5th Cir.1992); *see also Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir.1993); *General Guaranty Ins. Co. v. Parkerson*, 369 F.2d 821 (5th Cir.1966); *Richardson v. Southwest Miss. Reg. Med. Ctr.*, 794 F.Supp. 198, 199 (S.D.Miss.1992) (Wingate, J.). The court is obliged to draw all reasonable inferences in favor of the non-moving party before granting a motion to dismiss for failure to state a claim. *See Fernandez-Montes*, 987 F.2d at 284.

A moving party under Rule 56 of the Federal Rules of Civil Procedure is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In response to the motion, the adverse party must show that there exists a dispute over issues of fact which

must be resolved at trial. If the adverse party does not make such a showing, the moving party is entitled to summary judgment. Fed. R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The evidence offered in opposition to the motion is to be believed, and all reasonable inferences are to be drawn in favor of the adverse party. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513.

1. Duty to Give Constitutional Construction and Abstention

The Attorney General has correctly observed that this court has a duty, where possible, to avoid a construction which invalidates a statute. *See United States v. Security Indus. Bank*, 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 693, 99 S.Ct. 2545, 2553, 61 L.Ed.2d 176 (1979); *Crowell v. Benson*, 235 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1982). This canon of statutory construction does not require, however, that the court press a particular construction to the point of distingenuous evasion or to the point of rewriting the statute. *See Chapman v. United States*, 500 U.S. 453, 464, 111 S.Ct. 1919, 1927, 114 L.Ed.2d 524 (1991); *United States v. Locke*, 471 U.S. 84, 96, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (1985). As will be seen in § IV of this opinion, this court has striven to follow this canon of statutory construction, which upon application, simply does not favor the defendants.

Furthermore, the mere fact that this statute contains terms which are unclear or susceptible to multiple interpretations does not persuade this court to abstain from adjudicating this dispute. *See Procunier v. Martinez*, 416 U.S. 396, 401 n. 5, 94 S.Ct. 1800, 1805 n. 5, 40 L.Ed.2d 224 (1974) (holding that not every vagueness challenge

to an uninterpreted state statute constitutes a proper case for abstention). The Attorney General argues the appropriateness of a *Pullman*-type abstention here on the grounds that there is currently pending in state court a lawsuit which might address the construction of the school-prayer statute and construe any vague, unclear terms.

The abstention doctrine embodied in *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), simply does not apply here. *Pullman*-type abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." *Harrison v. NAACP*, 360 U.S. 167, 175, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959); *see also Allen v. McCurry*, 449 U.S. 90, 101 n. 17, 101 S.Ct. 411, 418 n. 17, 66 L.Ed.2d 308 (1980). It applies where there is the existence of an " 'uncertain issue of state law, the resolution of which may eliminate or materially alter the federal constitutional question.' " *Martinez*, 416 U.S. at 402-03, 94 S.Ct. at 1806 (quoting *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50 (1965)). First, we are not faced with such a situation here. We do not have here "an uncertain issue of state law." Secondly, the only pending state case remotely pertinent to the one at bar is the District's pending appeal before the Mississippi Supreme Court challenging the Chancellor's finding that "lack of professional judgment" does not constitute "good cause," so as to warrant Knox's firing. *See Knox*, 638 So.2d 1278. The gravamen of that lawsuit does not concern the dispute here over the constitutionality of the school-prayer statute. Defendants' abstention argument is both misplaced and unsupported.

2. Lack of "Case or Controversy" and Standing

In order to confer Article III jurisdiction, the plaintiffs must make an allegation of present or immediate injury in fact, where the parties requesting standing have "al-

leged such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962); *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). In *Meltzer v. Bd. of Public Instruction of Orange Cty.*, 548 F.2d 559 (5th Cir.1977), the Fifth Circuit struggled to craft a workable definition for "case or controversy" and had this to say of the sometimes ineffable term:

> The Declaratory Judgment Act's limitation to "cases of actual controversy" has regard to the constitutional provision in Article III and is operative only in respect to controversies which are such in the constitutional sense, the word "actual" being one of emphasis rather than of definition. *See, e.g., Aetna Life Insurance Co. v. Haworth*, 1937, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, *reh. denied*, 300 U.S. 687, 57 S.Ct. 667, 81 L.Ed. 889. Thus, there can be no case or controversy where parties seek adjudication of only a political question, or merely seek an advisory opinion, or where the litigation presents merely an abstract, academic or hypothetical question, or where the question sought to be adjudicated has been mooted by subsequent developments, or where the plaintiff has no standing to maintain the action.
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> In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826, the Supreme Court emphasized that the difference between an abstract question and a "controversy" contemplated by 28 U.S.C.A. § 2201 is necessarily one of degree. Faced with the difficulty of fashioning a precise test for determining whether there is such a controversy in a particular case, the Court substantially avoided the problem by using

> an essentially circular test: "The question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273, 61 S.Ct. at 512.
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> In *Steffel v. Thompson* [415 U.S. 452, 94 S.Ct. 1209, 89 L.Ed.2d 505 (1974)], *supra*, the Supreme Court discussed and applied the case or controversy aspects of the Declaratory Judgment Act in its criminal setting. The Court there pointed out that there were two stages to the case or controversy inquiry. The first is whether the appellant's allegations are "imaginary or speculative" or whether they are, on the contrary, real and substantial.

Meltzer v. Bd. of Public Instruction of Orange Cty., 548 F.2d at 569-70.

Contrary to defendants' argument, this court finds that the plaintiffs herein have alleged real and substantial injury which may result from the implementation of the school-prayer statute so as to confer Article III jurisdiction. It is not necessary that the plaintiffs await actual enforcement of the school-prayer statute before they may seek judicial relief. *See, e.g., Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. Unit A 1981).[15] The fact that the statute has not yet been enforced does not render the plaintiffs' alleged injuries conjectural or premature for

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[15] *In Karen v. Treen*, 653 F.2d at 902, upon addressing the involved Louisiana statute and its derivative Jefferson Parish School Board regulations which established guidelines for student participation in prayer at school, the Fifth Circuit stated:

> The Jefferson Parish program has yet to be put into effect. Thus, the nature and extent of state involvement in religious activity is in some measure speculative at this time. What is certain is that the statute itself makes inappropriate governmental involvement in religious affairs inevitable.

adjudication. The testimony of Dr. Merritt and Dr. Reeves that they constantly have been besieged by student requests to have public, classroom prayer and that they resonably expect many students to act under the school-prayer statute at issue here amply demonstrates that the risk of injury is neither remote nor speculative. Tr. of Aug. 16, 1994, Hr'g at 23, 26 (Dr. Merritt); Tr. of Aug. 16, 1994. Hr'g at 39-44 (Dr. Reeves). The huge demonstrations and conconmitant public outcry for the return of prayer to the public schools in the aftermath of the Dr. Knox controversy likewise demonstrate that the interest in public school prayer is real and will translate into action under the statute. Accordingly, this court holds that the issues in this case are sufficiently concrete and sharp so as to present an Article III case.

Although the issues of whether this is an Article III case and whether the plaintiffs have standing are technically separate issues, the plaintiffs' satisfaction of their Article III burden adequately supports their standing to bring this action. *See School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 224 n. 9, 83 S.Ct. 1560, 1572 n. 9, 10 L.Ed.2d 844 (1963) ("But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed The parties here are school children and their parents who are directly affected by the laws and practices against which their complaints are directed." (citations omitted)); *Karen B.,* 653 F.2d at 902.

3. Lack of State Action

The Attorney General argues that the plaintiffs have failed to state a claim under 42 U.S.C. § 1983 [16] because

[16] Title 42 U.S.C. § 1983 provides in pertinent part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the

no state action is present in this case. Rather, says the Attorney General, plaintiffs' real complaint is against the private actions of third parties who may attempt to exercise their rights under the school-prayer statute.

Such a characterization misstates the gravamen of the plaintiffs' complaint. *See Blum v. Yaretsky*, 457 U.S. 991, 1003, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982) ("[f]aithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiffs' complaint"). What is complained of here is a legislative enactment which potentially empowers third parties, at their whim, to offer prayers, with or without student body agreement, at all school events and assemblies, whether noncompulsory or compulsory. If this empowerment in all other respects oversteps the the bounds of the Establishment Clause, the state may not escape liability under 42 U.S.C. § 1983 by claiming that the school-prayer statute merely authorizes private parties to take these actions.

4. Facial Challenge to the Statute

The Attorney General takes the position that the plaintiffs have not met their heavy burden of establishing that the challenged statute could be valid "under no set of circumstances." *See United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). This principle has been applied in various areas such as facial attacks on the Bail Reform Act, *see id.*; and abortion laws, *see, e.g., Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 656, 121 L.Ed.2d 582 (1992). However, the rigid dictates of

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District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Salerno do not apply in Establishment Clause cases. The United States Supreme Court has stated that facial challenges to laws impacting the Establishment Clause are best analyzed under the *Lemon* test.

> This said, we turn to consider whether the District Court was correct in concluding that the AFLA [the Adolescent Family Life Act] was unconstitutional on its face. As in previous cases involving facial challenges on Establishment Clause grounds, *e.g., Edwards v. Aguillard* [482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987)] *supra; Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Bowen v. Kendrick, 487 U.S. 589, 601-02, 108 S.Ct. 2562, 2569, 101 L.Ed.2d 520 (1988). The Supreme Court has consistently failed to draw distinctions between a facial attack and an "as applied" attack on statutes in the Establishment Clause arena. *Id.* at 600-02, 108 S.Ct. at 2569-70.

5. Prior Restraint

Relying on the cases of *Board of Educ. of Westside Community Sch. v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), *Lamb's Chapel v. Center Moriches Sch. Dist.,* —— U.S. ——, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), and *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the Attorney General contends that the injunctive relief sought by the plaintiffs would result in an impermissible prior restraint on the protected First Amendment rights of students . The Attorney General's argument is neither persuasive nor novel. This argument was addressed and rejected in both *Lee v. Weisman,* 505 U.S. ——, 112 S.Ct. 2649, 120 L.Ed.

2d 467 (1992), and *Doe v. Duncanville Independent School Dist.*, 994 F.2d 160 (5th Cir.1993). In *Doe*, the Fifth Circuit stated:

> The DISD's [Duncanville Independent School District] assertion of its employees' First Amendment rights of speech, association, and free exercise, and its attempt to portray its refusal to interfere with their spontaneous religious expression as a necessary accommodation of religion, while understandable, cannot withstand analysis. Acceptance of DISD's argument would produce an unwieldly result foreclosed by precedent; in *Lee*, the Court affirmed that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." 505 U.S. at ——, 112 S.Ct. at 2655.

Moreover, as acknowledged by the Attorney General, the students' rights of Free Speech and Free Exercise are pre-existing and, as such, the granting of an injunction would have no bearing on the students' ability to freely exercise their pre-existing rights. An injunction here would not prevent students from praying silently alone or assembling together to pray before or after school. In fact, Dr. Reeves testified that Provine High School, across town from Wingfield High, presently allows a student prayer group to meet on the school grounds for the purpose of having morning prayers.

6. Eleventh Amendment Immunity

During argument held on August 16, 1994, the Attorney General hinted for the first time that the Eleventh Amendment may bar the relief sought here. This argument was not raised in the motion to dismiss and is, therefore, not properly before the court. Nonetheless, the court is not persuaded by the argument. Injunctive relief of the character sought here is not barred by Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102, 104 S.Ct. 900, 909, 79 L.Ed.2d 67

(1984); *Edelman v. Jordan,* 415 U.S. 651, 666-67, 94 S.Ct. 1347, 1357-58, 39 L.Ed.2d 662 (1974); *Ex parte Young,* 209 U.S. 123, 155-61, 28 S.Ct. 441, 452-54, 52 L.Ed. 714 (1908).

B. Motion to Intervene

To date, AFALC has been permitted to participate in these proceedings as amicus curiae. After the court granted its preliminary injunction of August 11, 1994, the court revisited AFALC's motion to intervene as a party defendant. During that hearing on August 16, 1994, AFALC argued that it was entitled to intervention of right or, in the alternative, to permissive intervention. *See* Fed.R.Civ. P. 24(a) & (b).

A proposed intervenor shall be permitted of right to intervene in an action: (1) when a statute confers an unconditional right to intervene; (2) when the proposed intervenor claims an interest relating to the property or transaction which is the subject of the litigation; (3) when the proposed intervenor is so situated that the disposition of the action, as a practical matter, may impair or impede its ability to protect that interest; and (4) when the proposed intervenor's interest is inadequately represented by the parties to the lawsuit. Fed.R.Civ.P. 24(a); *Kneeland v. National Collegiate Athletic Ass'n,* 806 F.2d 1285, 1287 (5th Cir.1987); *Bush v. Viterna,* 740 F.2d 350, 354 (5th Cir.1984) (citing cases); *see also* 7C Charles A. Wright *et al.,* Federal Practice and Procedure §§ 1906-1909 (1986 & Supp.1994).

This court finds that AFALC's interest is adequately represented here by the Attorney General's office which, by statute,[17] is charged with defending the school-prayer

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[17] Title 28 U.S.C. § 2403 provides as follows:

2403. Intervention by United States or a State; constitutional question.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee

law on behalf of all of the citizens of the State. The prerequisite prong of "inadequate representation" being absent, this court is obliged to deny AFALC's motion for intervention of right.

As an alternative basis for interevntion, AFALC seeks permissive intervention and correctly observes that it is within the discretion of the court to grant permissive intervention when: (1) the application is timely made; (2) the proposed intervenor's claim or defense and the main action have a common question of law or fact; and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Fed.R. Civ.P. 24(b); *League of United Latin Am. Citizens v. Clements*, 884 F.2d 185, 189 n. 2 (5th Cir.1989); *Bush*, 740 F.2d at 358-59; *see also* Charles A. Wright *et al.*, *supra*, §§ 1910-1913.

Permitting AFALC to intervene in this matter would serve no purpose other than delay. AFALC's efforts would but duplicate those of counsel for the Attorney General's Office. The Court in *Bush* voiced sentiments on a permissive intervention question before it which certainly embraces the situation here.

> It is easy enough to see what are the arguments against intervention, where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take ad-

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thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of he State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to the court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

> ditional time. Even if they have no witnesses of their own, they are the sources of additional questions, briefs, arguments, motions and the like which tend to make the proceedings a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

Bush, 740 F.2d at 359, quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D.Mass.1943).

Consequently, the court denies AFALC's motion for permissive intervention. AFALC will be allowed to continue as amicus.

IV. STANDARDS FOR INJUNCTIVE RELIEF AND REVIEW UNDER THE ESTABLISHMENT CLAUSE

In order to obtain a preliminary injunction, the plaintiffs here have the burden of proving four factors: a substantial likelihood of success on the merits; a substantial threat that they will suffer irreparable injury if the injunction is not granted; that the threatened injury to the plaintiffs outweighs the threatened harm the injunction may do to the defendants; and that granting the preliminary injunction will not disserve the public interest. *Callaway*, 489 F.2d at 572; *Doe*, 994 F.2d at 163.

As stated earlier, where possible the court has a duty to construe a statute in a way that upholds its constitutionality. This means, in passing on the constitutionality of a statute, the court must separate the valid part from the invalid part. *Griffin v. Breckenridge*, 403 U.S. 88, 104, 91 S.Ct. 1790, 1799, 29 L.Ed.2d 338 (1971). The presence of a severance clause may assist the court in that function. *See, e.g., EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir.1984). Accordingly, this court must now take measure of the various provisions of the

school-prayer statute to determine, under the applicable standards articulated by the United States Supreme Court, whether any, all or only parts of the statute should be enjoined.

There has been some debate between the parties as to which standard this court should employ to assess the validity of the subject statute. A brief review of the tests applied by the United States Supreme Court reveals five. The tripartie test [18] set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), until recently has been the prevailing test to determine whether a challenged activity violates the Establishment Clause. The United States Supreme Court also has employed the endorsement test [19] of *County of Allegheny v. ACLU*, 492 U.S. 573, 595 & n. 46, 109 S.Ct. 3086, 3102 & n. 46, 106 L.Ed.2d 472 (1989). And recently in *Weisman*, 505 U.S. at ——, 112 S.Ct. at 2655, the United States Supreme Court employed the so-called "coercion" test.[20] In *Jones v. Clear Creek Indep. Sch. Dist.* (*"Jones II"*), 977 F.2d 963 (5th Cir.1992), the Fifth Circuit applied all five tests. This court does not quarrel with this ap-

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[18] Under the *Lemon* test, the challenged conduct must: (1) have a predominantly secular purpose; (2) have a primary effect that neither advances, endorses nor inhibits religion; (3) not result in excessive entanglement of government and religion. *Id.* at 612-13, 91 S.Ct. at 2111. In *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963 (5th Cir.1992), the Court counted the *Lemon* test as three separate tests, which explains the reference to five tests in this opinion and the *Jones II* opinion. *See Jones II*, 977 F.2d at 966.

[19] "We understand government to unconstitutionally endorse religions when a reasonable person would view the challenged government action as a disapproval her contrary religious choices." *Jones, II*, 977 F.2d at 968, citing *Weisman*, 505 U.S. at ——. 112 S.Ct. at 2665 n.9.

[20] *Weisman* identifies unconstitutional coercion when (1) government directs, (2) a former religious exercise, (3) in such a way as to oblige the participation of objectors. 500 U.S. at ——, 112 S.Ct. at 2655.

proach, but need not here make an exhausting analysis under each of the tests because the defects hereinafter discussed are apparent under any of the tests.

V. ANALYSIS OF THE STATUTE

The school prayer statute at issue here is a comprehensive, broad-sweeping legislative enactment which purports to embrace within its span school prayer at virtually all school events and upon all public property. The statute fails to define "prayer." Nonetheless, the court recognizes that "prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people." *Karen B. v. Treen*, 653 F.2d at 901. The school events mentioned by the statute are "assemblies," "sporting events," "graduation or commencement ceremonies," and "other school-related student events." No where does the statute define any of these terms. Hence, a reader of the statute is left uninformed as to the meanings of "assemblies" and whether such also includes groups in classroom instruction; nor is the meaning of "other school-related student events" clarified.

The statute is clear, however, in its thrust to extend prayer for these undefined school-related activities well beyond the schoolhouse doors to "public school property," other "public property," and "other property." This extension of prayer rights for school-related activities beyond the school house doors plainly serves to heighten the concern for the missing definitions of "assemblies", and "other school-related student events."

Unlike the regulations in *Jones II* and *Weisman*, which were directed at high school seniors, and that in *Hall v. Board of Sch. Com'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit A 1981), which was aimed at high school students, the statute here is directed at grades, kindergarten through twelve. This statute authorizes elementary, (grades k-5), middle, (grades 6-8), and high school

(grades 9-12) students to offer nonsectarian and nonproselytizing prayer at compulsory and noncompulsory school-related events. The statute presumably expects the state school districts to exact regulations for the implementation of school prayer because the statute is silent as to any procedures. Questions such as how students are to be selected to offer prayers; who will review the prayers to ensure the nonsectarian and nonproselytizing nature of such; the duration of any prayer; and the timing of the prayers are left unanswered by the statute. But, these questions are particularly worrisome and immediate where school prayer rights have been given not only to high school students, but to elementary students as well.

Students are not the only ones who are authorized to deliver prayers under the statute. The statute guarantees the right of prayer on public school property at school-related activities to students and *others* (emphasis added). The statute permits this, even though settled case law forbids teachers and nonstudents from leading prayers at the schools. *See Weisman,* 505 U.S. at ——, 112 S.Ct. at 2657; *Engel v. Vitale,* 370 U.S. 421, 425, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

Missing from the statute is any "opt out" provision which would permit students who are opposed to prayer to leave the room or refuse to participate. The *Weisman* Court viewed as "coercive" the fact that the only alternative for a student opposed to prayer at high school commencement was to absent herself from the ceremonies. 505 U.S. at ——, 112 S.Ct. at 2661. *See also Engel,* 370 U.S. at 428, 82 S.Ct. at 1267; *Schempp,* 374 U.S. at 224-25, 83 S.Ct. at 1573. Since the instant statute purports to extend school prayer to compulsory events, the statute appears unsympathetic to the plight of those unwilling to participate.

The above observations have not gone unnoticed by the school educators, Dr. Merritt and Dr. Reeves, who testified during the hearing on this matter. Both edu-

cators testified that the statute as written would disrupt instructional and educational activities throughout the District. Unless answers to the questions above raised are supplied, these eminent educators reasonably apprehend that the effect of this far-sweeping statute would cause disharmony, confusion, and upset. This result would be ironic and unfortunate, since the authors and supporters of the school-prayer law feverently hope to achieve just the opposite. Clearly, this statute has problems. And, clearly, several of its parts offend the Establishment Clause. Those particular aspects will be addressed below.

A. *Invocations and Benedictions*

As the statute now reads: "invocations, benedictions *or* nonsectarian, nonproselytizing student-initiated voluntary prayer shall be permitted. . . ." 1994 Miss.Laws ch. 609 § 1(2) (emphasis added). The statute does not specify who may deliver invocations and benedictions during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events. If the statute read that nonsectarian, non-proselytizing student-initiated voluntary invocations and benedictions shall be permitted, one would know who is authorized to deliver such. As it now reads, any person, including school administrators, teachers, or members of the clergy, seemingly would be permitted under the statute to deliver invocations and benedictions at a wide range of school-related functions. This interpretation is supported by the statute's concern with: "[t]he exercise of these rights [1994 Miss.Laws ch. 609, § 1(2)] on public school property, other public property or other property for such school-related activities, by students and *others*. . . ." *Id.* § 1(4) (emphasis added).

Of course, settled case law clearly establishes that clergy, school officials and teachers may not lead students in prayer. *See, e.g., Weisman,* 506 U.S. ——, 112 S.Ct. 2649 (holding that inviting clergy to offer invoca-

tion and benediction prayers at high school graduation violates Establishment Clause); *Schempp*, 374 U.S. 203, 83 S.Ct. 1560 (invalidating the recital of the Lord's Prayer in public school classrooms); *Doe*, 994 F.2d 160 (upholding a preliminary injunction enjoining the school district's practice of permitting the coach of the basketball team to sponsor prayers at the end of games and practices); *Karen B.*, 653 F.2d 897 (invalidating school board guidelines which permitted student and teacher prayers in classrooms); *Hall*, 656 F.2d 999 (invalidating practice of conducting morning devotional readings over the school's public address system).

Additionally, even student-initiated nonsectarian and nonproselytizing invocations and benedictions may run afoul of the "endorsement" test. *See Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 831-32 (11th Cir.1989) ("When religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation. . . . Furthermore, to persons of any age who do not believe in prayer, religious invocations permitted by the equal access plan convey the message that the state endorses religions believing in prayer and denigrates those religions that do not. If these prayers are delivered by authority figures, such as teachers, as is possible under the equal access plan, the message endorsing prayer becomes even stronger.").

B. Nonsectarian, Nonproseltyzing Student-Initiated Voluntary Prayer

Permitting nonsectarian, nonproselytizing student-initiated voluntary prayer was found to be permissible by the Fifth Circuit in *Jones II*. However, that decision only addressed the propriety of invocations and benedictions at high school commencement ceremonies. There-

fore, the court is bound to hold that nonsectarian, nonproselytizing student-initiated voluntary prayers are permissible at high school commencement ceremonies. Whether this type of prayer is permissible in other contexts, such as compulsory or noncompulsory assemblies or student sporting events, for instance, is an entirely different matter.

C. Compulsory or Noncompulsory School-Related Student Assemblies

Dr. Merritt and Dr. Reeves testified that a variety of student assemblies are held at schools throughout the District. Among the named programs were pep rallies, honor roll recognition assemblies, beauty pageants, athletics honors and awards, orientations, drug education programs, standardized testing, dramas, talent shows, musicals, band concerts, Parent Teacher Association, and Boy Scouts. Their testimony revealed that the majority of these programs are held during instructional hours. Teachers usually establish the agendas of these programs and oversee their implementation. Neither Dr. Merritt nor Dr. Reeves stated whether attendance at assemblies is compulsory. *See* Tr. of Aug. 16, 1994, Hr'g at 5-9 (Dr. Merritt); Tr. of Aug. 16, 1994, Hr'g at 37-39 (Dr. Reeves).

The court finds that permitting nonsectarian, nonproselytizing student-initiated voluntary prayer at compulsory student assemblies may violate the tenets of *Weisman*, 505 U.S. at ——, 112 S.Ct. at 2661. If students are subjected to prayer in a "captive audience" situation, the state, although not officially delivering the prayer, may be effectively coercing students who do not wish to hear or participate in a prayer to do so. Even a rule that would permit students to absent themselves from an assembly they find offensive, even a noncompulsory one, would not cure the Establishment Clause problem. *See Weisman*; *Schempp*, 374 U.S. at 226, 83 S.Ct. at 1573 (daily Bible reading and class recitation of prayer vio-

lates First Amendment notwithstanding that students could be excused); *Engel,* 370 U.S. at 430, 82 S.Ct. at 1266 ("neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause.")

The court further finds that permitting students to offer nonsectarian, nonproselytizing student-initiated voluntary prayer at noncompulsory school-related student assemblies may also violate the tenets of *Lemon.* The Attorney General has stated that student prayer at noncompulsory student events serves, in small part, to solemnize an assembly, to prevent viewpoint discrimination, and to accommodate the free exercise of religion. None of these proffered reasons is persuasive.

First, unlike high school graduation, there is nothing so momentous or singularly important about noncompulsory student assemblies that necessitates the need for solemnization. The Attorney General has not shown that these assemblies are steeped in centuries of tradition. *Cf. Marsh v. Chambers.* Neither has the Attorney General shown that nonsectarian, nonproselytizing student prayer is needed to combat viewpoint discrimination or to accommodate religious expression. These rights exist independently of the school-prayer statute.

Second, the "principal" or "primary" effect of permitting student-initiated voluntary prayer at noncompulsory school related student assemblies appears to advance religion. "Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit." *Brandon v. Board of Ed. of Guilderland Cent. Sch.,* 635 F.2d 971, 978 (2nd Cir.1980); *Roemer v. The Board of Public Works,*

426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976). *See also Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 761 (9th Cir.1981) ("moreover, these cases support no meaningful distinction between school authorities actually organizing religious activity and officials merely 'permitting' students to direct the exercises").

The court has one final concern about student assemblies. It is not unreasonable to assume that attendance at assemblies is compulsory, since the majority of the assemblies take place during instructional hours. In instances where assemblies for drug programs, testing, orientation are held, for instance, these assemblies serve an instructional and educational function. Indeed, these assemblies are nothing more than extensions of the classrooms. It stands to reason that if students are prohibited from praying in the classrooms, allowing them to do so in assemblies of an instructional nature likewise fails all three prongs of the *Lemon* test. *See Williams v. Vermont*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (striking down statute which permitted daily moment of silence expressly for prayer); *Karen B.*, 653 F.2d at 902 (striking down statute authorizing voluntary student-initiated prayer or teacher-initiated prayer at the start of school day).

D. Student Sporting Events

The court finds that permitting nonsectarian, nonproselytizing, student-initiated voluntary prayer at student sporting events may violate the first prong of the *Lemon* test. In order to hurdle the first prong of the *Lemon* test, the Attorney General must demonstrate that the challenged action has a predominantly secular purpose. The Attorney General has stated that student prayer at student sporting events serves, in small part, to solemnize the sporting events; to prevent viewpoint discrimination; and to accommodate the free exercise of religion. None of these proffered reasons is persuasive.

The *Jones II* Court acknowledged that solemnization serves the legitimate secular purpose of ceremonial prayer. 977 F.2d at 966-97. The dignity and singular importance of the event in question is certainly a factor to consider when selecting a public event for which prayer may be appropriate. *See Weisman*, 505 U.S. at ——-——, 112 S.Ct. at 2659-60. The offering of prayer to solemnize any and all student sporting events seems, at a minimum, to inflate the singular momentousness of each sporting event held over the course of a lengthy season. The range of sporting events in the District include football, basketball, baseball, softball, volleyball, golf, soccer, and tennis. The testimony of Dr. Merritt indicates that during an average week a high school may have more than one sporting event per day. And on the middle school level, Dr. Merritt stated that there is some activity going on at least once a week in every middle school. It is difficult to see how permitting prayers at these types of sporting events falls within the embrace of *Weisman* or *Jones II*. Despite the Attorney General's attempts to prove otherwise, the court simply is not convinced that prayer at a sporting event serves a secular purpose. *See also Karen B.*, 653 F.2d at 901 ("The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests."); *Jager*, 862 F.2d at 829-30 (rejecting secular purpose of prayer at high school football games); *Doe v. Aldine Indep. Sch. Dist.*, 563 F.Supp. 883 (S.D.Tex. 1982) (same).

Further, the fact that the prayers are nonsectarian, nonproselytizing, and voluntarily delivered by students does not remove the taint of government sponsorship of religion. *See Engel*, 370 U.S. at 430, 82 S.Ct. at 1266-67 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from 653 F.2d at 902.

Also troubling is that by permitting prayer at student sporting events, it appears that the government is endorsing prayer. As stated above, a statute or regulation which has the effect of endorsing religion does not pass constitutional muster. *See Jager,* 862 F.2d at 831.

The Attorney General's second proffered secular purpose of prayer at student sporting events—prohibiting viewpoint discrimination—must be rejected out of hand. While the United States Supreme Court has recognized that prohibiting viewpoint discrimination may serve a secular purpose, *see Mergens,* 496 U.S. at 248, 110 S.Ct. at 2370, the Attorney General has not shown that any of the forums where student prayer is authorized under the statute are open forums and that religious groups have been denied access. The *Mergens* line of cases cited by the Attorney General involves situations where religious groups sought access to public school facilities and were denied for fear that access to these facilities by religious groups would violate the Establishment Clause. The Supreme Court has consistently held that when the state denies to religious groups the same access it provides to other groups, the state has engaged in viewpoint discrimination. *See, e.g., Lamb's Chapel; Mergens.* We are not faced with such a situation here. Student assemblies, student sporting events, graduation or commencment, and other school-related activities ostensibly are not open forums in public schools. By granting prayer an exalted status over other types of speech in these forums, the state runs the grave risk of favoring one religion over another or favoring religion over irreligion. *See Board of Educ. of Kiryas Joel v. Grumet,* —— U.S. ——, ——, 114 S.Ct. 2481, 2491, 129 L.Ed.2d 546 (1994).

E. Graduation or Commencement Ceremonies

As stated in § V.B of this opinion, student prayer at high school commencement ceremonies is certainly appropriate; it is constitutional vel non. What is not certain is

whether student prayer at graduation from the lower grades (kindergarten to elementary; elementary to middle school; and middle school to high school) is appropriate. Dr. Merritt gave testimony that the District has no Board-sanctioned or District-sanctioned graduation exercise other than the conferring of a diploma upon graduation from high school. Tr. of Aug. 16, 1994, Hr'g at 13 (Dr. Merritt). He did acknowledge, however, that some schools in the District hold ceremonies to commemorate passage from elementary to middle school and middle school to high school. Since the school-prayer statute at issue applies with equal force to all grades of the public schools, the court must consider the appropriateness of student prayer at these less ceremonious graduations.

There is nothing in the language of *Jones II* to suggest that the court meant for commencement to encompass any ceremony other than the ceremony signifying completion of high school. And, this court is not persuaded that commencement should be interpreted to include graduation ceremonies for lower grades. Particularly compelling here is the fact that students in lower grades "are often susceptible to pressure from their peers toward conformity, and that the influence is strongest in matters of social convention." *Weisman,* 505 U.S. at ——, 112 S.Ct. at 2659. Coercion of this nature, no matter how subtle or pronounced, is potentially at odds with the Establishment Clause. *Id.,* 505 U.S. at ——-——, 112 S.Ct. at 2658-61. Accordingly, the court believes that the term "graduation" as used in the statute is overbroad inasmuch as the statute seemingly permits more than the Fifth Circuit authorized in *Jones II.*

F. Other School-Related Student Events

The staute does not specify what the terms "other school-related student events" encompass. This term could refer to the classroom, school field trips or the prom. Without further guidance from the legislature or

the interpretative case law, this term is virtually meaningless. It offers no bounds as to what is encompassed by the law.

VI. FINDINGS ON INJUNCTION FACTORS

A. Substantial Likelihood of Success

Based on the foregoing, the court believes that plaintiffs have demonstrated a substantial likelihood that they would prevail on the merits of this case.

B. Substantial Threat of Irreparable Injury

The court believes that plaintiffs have adequately demonstrated that they will suffer irreparable injury if the school-prayer statute is not enjoined. *See Doe,* 994 F.2d at 167. When First Amendment freedoms are lost, even if for minimal periods of time, irreparable injury has occurred. *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976).

C. The Theatened Injury to Plaintiffs Outweighs the Theartened Harm the Injunction May Do to Defendant.

The District does not argue that it will be harmed if the school-prayer statute is enjoined. The Attorney General, however, contends that the issuance of an injunction would have a chilling effect on students' First Amendment rights. The court is not persuaded by that contention. As stated above, the granting of an injunction would have no bearing on the students' ability to freely exercise their existing rights of free speech and free exercise. Consequently, the court finds that the threatened injury to the plaintiffs outweighs any harm the injunction would do to the defendants. *See Doe,* 994 F.2d at 167.

D. Public Interest

The court finds that the public interest will not be disserved by the issuance of an injnction aimed at preventing the enforcement of a potentially unconstitutional statute. *See Doe*, 994 F.2d at 166.

VII. CONCLUSION

Our nation's elementary and secondary schools are at the center of our democratic society; they play a unique role in transmitting fundamental education and basic values to our youth. Over the years, pursuant to the dictates of the Establishment Clause of the First Amendment to the United States Constitution, the federal courts have been zealous in ensuring that these educational laboratories of learning and development are maintained in an atmosphere of religious neutrality. The jurisprudence of the United States Supreme Court and that of the Fifth Circuit clearly attest to this point, as over the years this emphasis on religious neutrality in the nation's public schools has resulted in a number of decisions holding unconstitutional various attempts to introduce prayer in the public schools. *See Weisman*, 505 U.S. ——, 112 S.Ct. 2649 (holding that inviting clergy to offer invocation and benediction prayers at high school graduation violates Establishment Clause); *Jaffree*, 472 U.S. 38, 105 S.Ct. 2479 (holding unconstitutional statute authorizing a daily period of silence in public schools for mediation or voluntary prayer); *Schempp*, 374 U.S. 203, 83 S.Ct. 1560 (invalidating daily reading of Bible verses and Lord's Prayer in the public schools); *Engel*, 370 U.S. 421, 82 S.Ct. 1261 (holding unconstitutional recitation of "denominationally neutral" prayer); *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (holding unconstitutional the posting copy of Ten Commandments on public school walls); *Doe*, 994 F.2d 160 (invalidating district's practice of permitting coach of extracurricular junior high basketball team to sponsor prayers

at the end of games and at practices); *Jones II*, 977 F.2d 963 (holding constitutional student-initiated non-sectarian, nonproseltyzing prayer at commencement); *Hall*, 656 F.2d 999 (holding unconstitutional high school's practice of permitting students to conduct morning devotional readings over the school's public address system and teaching an elective Bible literature course that consisted entirely of Christian perspective and within that a fundamentalist and/or evangelical doctrine); *Lubbock Civil Liberties Union v. Lubbock Independent Sch. Dist.*, 669 F.2d 1038 (5th Cir.1982) (holding unconstitutional morning Bible reading over school public address system, classroom prayers led by teachers, a period of silent prayer ended by teachers, a period of silent prayer ended by "Amen" over public address system and distribution of "Gideon" Bibles to fifth and sixth grade students); *Karen B.*, 653 F.2d 897 (invalidating statute authorizing voluntary student-initiated prayer at the start of the school day); *Meltzer*, 577 F.2d 311 (holding unconstitutional resolution requiring daily Bible reading and prayer in public schools).

The statute at issue here is the most far-reaching one this court has encountered in its research. The aim of Mississippi's school-prayer statute is to permit prayer at virtually any and all school-related activities. Presently, this court cannot find support for this comprehensive approach either in the Establishment Clause itself, or in that body of cases which have given interpretation to the Clause.

Accordingly, this court holds to its earlier pronouncement that the enforcement of this statute should be enjoined, except with one modification. In part, the court has held that the portion of the statute that permits nonsectarian, nonproselytizing student-initiated voluntary prayer at high school commencements (not graduation from lower grades) has the blessings of the Fifth Circuit

pursuant to its holding in *Jones II*. The ACLU argues.[21] Hence that portion of the school-prayer statute which permits prayers at commencement ceremonies will not be enjoined so long as any such circumstances comport with the spirit and dictates of *Jones II*. In all other respects, this court hereby enjoins the enforcement of the Mississippi School-Prayer Statute, 1994 Miss.Laws ch. 609, §§ 1 to 3 (codified as amended at Miss. Code Ann. §§ 37-13-4 & 37-13-4.1 (rev. 1990)).

IT IS, THEREFORE, ORDERED AND ADJUDGED that the school-prayer statute shall be enjoined in all parts, except as to nonsectarian, nonproselytizing student-initiated voluntary prayer at high school commencement, as condoned by *Jones II*.

SO ORDERED AND ADJUDGED.

[Appendix with text of statute deleted]

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[21] Plaintiffs' Memorandum of Points and Authorities in Opposition to the Attorney General's Motion to Dismiss or for Summary Judgment and in Further Support of Plaintiffs' Motion for a Preliminary Injunction, p. 24.

APPENDIX C

STATUTE INVOLVED

GENERAL LAWS OF THE
STATE OF MISSISSIPPI, 1994

CHAPTER NO. 609
HOUSE BILL NO. 222

[Codified as Miss. Code Ann. Section 37-13-4]

AN ACT TO PERMIT NONSECTARIAN, NON-PROSELYTIZING, STUDENT-INITIATED VOLUNTARY PRAYER ON PUBLIC SCHOOL PROPERTY, OTHER PUBLIC PROPERTY OR OTHER PROPERTY AT SCHOOL-RELATED ACTIVITIES, INCLUDING STUDENT SPORTING EVENTS, GRADUATION OR COMMENCEMENT CEREMONIES AND OTHER STUDENT ASSEMBLIES AND EVENTS; TO AMEND SECTION 37-13-4, MISSISSIPPI CODE OF 1972, IN CONFORMITY WITH THE PROVISONS OF THIS ACT; AND FOR RELATED PURPOSES.

Be It Enacted By The Legislature Of The State Of Mississippi:

SECTION. 1. The following shall be codified as Section 37-13-4.1, Mississippi Code of 1972:

37-13-4.1. (1) The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution, to define for the citizens of Mississippi the rights and privileges that are accorded them on public school property, other public property or other property at school-related events; and to provide guidance to public school officials on the rights and requirements of law that they must apply. The intent and purpose of the Legislature is to accommodate the free exercise of religious rights of its

student citizens in the public schools and at public school events as provided to them by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

(2) On public school property, other public property or other property, invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer shall be permitted during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events.

(3) This section shall not diminish the right of any student or person to exercise his rights of free speech and religion, including prayer, as permitted by the United States Constitution, on public school property or other property, at times or events other than those stated in subsection (2) of this section.

(4) The exercise of the rights guaranteed under subsection (2) of this section shall not be construed to indicate any support, approval or sanction of the contents of any such prayer, invocation, benediction or other activity, or be construed as an unconstitutional use of any public property or other property by the State of Mississippi or any agency, department, board, commission, institution or other instrumentality thereof or any political subdivision of the state, including any county or municipality and any instrumentality thereof. The exercise of these rights on public school property, other public property or on other property for school-related activities, by students or others, shall not be construed as the promotion or establishment of any religion or religious belief.

(5) The provisions of this section are severable. If any part of this section is declared invalid or unconstitutional, that declaration shall not affect the part or parts that remain.

SECTION 2. Section 37-13-4, Mississippi Code of 1972, is amended as follows:

37-13-4. It shall be lawful for any teacher or school administrator in any of the schools of the state which are supported, in whole or in part, by the public funds of the state, to permit the voluntary participation by students or others in prayer. Nothing contained in this section shall authorize any teacher or other school authority to prescribe the form or content of any prayer. The provisions of this section shall not be construed to amend or repeal the provisions of Section 37-13-4.1 but shall be considered as supplemental and in addition to the provisions of Section 37-13-14.1.

SECTION 3. [Effective date] This act shall take effect and be in force from and after July 1, 1994.

APPROVED April 07, 1994

APPENDIX D

[Aug. 3, 1994]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

Civil Action No. 3:94CV411WS

DAVID INGREBRETSEN, on Behalf of Himself and his Daughter, ANNA INGREBRESTSEN; BERLENA MCCALLUM, on Behalf of Herself and Her Son, JOHN M. DOZIER; THE REV. DR. DONALD BELL, on Behalf of Himself and His Daughter, KATHRYN DIANA BELL; WILLIAM D. LAMSON, on Behalf of Himself and His Daughter, LEIGH LAMSON-QUAY; TERRY BACOLA, on Behalf of Herself and Her Sons, BRIAN BACOLA and DARREN BACOLA; ROBERT S. MCGOWAN; JERUSHA DEGROOTE; JOHN BAKER; AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC.,

Plaintiffs

VS.

THE JACKSON PUBLIC SCHOOL DISTRICT; BOARD OF TRUSTEES OF THE JACKSON PUBLIC SCHOOL DISTRICT, By and Through Its President, MARK BAILEY; and MIKE MOORE, In His Official Capacity as the Attorney General of the State of Mississippi,

Defendants

MOTION OF STATE ATTORNEY GENERAL TO DISMISS THE PLAINTIFFS' COMPLAINT OR FOR SUMMARY JUDGMENT

Pursuant to F.R.Civ.P. Rules 12(b)(1), 12(b)(6), and/or 56, Attorney General Mike Moore, through undersigned counsel and appearing on behalf of the State

of Mississippi, under 28 U.S.C. § 2403, respectfully moves the Court to dismiss the complaint or for the entry of summary judgment in his favor. As set forth in more detail in a Memorandum of Law submitted directly to the District Judge, the Attorney General would state as follows:

1. The Court must construe Chapter 609 to avoid if possible a danger of unconstitutionality, and so construed Chapter 609 is constitutional on its face; to the extent that Chapter 609 is unclear or ambiguous, the doctrine of abstention must be considered.

2. The complaint seeks to litigate matters which are hypothetical, contingent, and speculative, and it fails to present a concrete case or controversy as required by Article III doctrines.

3. Student-initiated free speech challenged by ACLU Plaintiffs is *private* action, not *state* action, as required for a claim under Section 1983.

4. Plaintiffs cannot meet their heavy burden of demonstrating that Chapter 609 is unconstitutional on its face.

5. Under the Fifth Circuit decision in *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993), Chapter 609 is constitutional on its face.

6. The drastic injunctive relief demanded by ACLU Plaintiffs would chill the exercise of protected First Amendment rights by students.

7. In the alternative, if the Court finds Chapter 609 to be unconstitutional, the severability doctrine applies, and only the invalid portion should be severed and the remainder left intact.

8. Attached hereto as Exhibit "1" is a true and correct copy of Chapter 609, General Laws of 1994.

9. Attached hereto as Exhibit "2" is a true and correct copy of the Opinion of the Chancery Court in *Bishop Earl Knox v. Board of Trustees for the Jackson Public School District*, Cause No. G-94-12 D/2, April 22, 1994. To the extent that any matters litigated in that matter are raised in this action by any party, the findings of fact made in that action are binding and may not be collaterally attacked or impeached in this Court.

WHEREFORE, the Attorney General prays that the complaint will be dismissed or that summary judgment in his favor will be granted.

Respectfully submitted,

MIKE MOORE, Attorney General
State of Mississippi

By: /s/ T. Hunt Cole, Jr.
T. HUNT COLE, JR., MSB No. 6349
Assistant Attorney General

Office of the Attorney General
P.O. Box 220
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601/359-3680

APPENDIX E

[Filed July 15, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:94CV411WS

DAVID INGEBRETSEN, on Behalf of Himself and His Daughter, ANNA INGEBRETSEN; BERLENA MCCALLUM, on Behalf of Herself and Her Son, JOHN M. DOZIER; THE REV. DR. DONALD BELL, on Behalf of Himself and His Daughter, KATHRYN DIANA BELL; WILLIAM D. LAMSON, on Behalf of Himself and His Daughter, LEIGH LAMSON-QUAY; TERRY BACOLA, on Behalf of Herself and Her Sons, BRIAN BACOLA and DARREN BACOLA; ROBERT S. MCGOWAN; JERUSHA DEGROOTE; JOHN BAKER; AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC.;

Plaintiffs,

VS.

THE JACKSON PUBLIC SCHOOL DISTRICT; BOARD OF TRUSTEES OF THE JACKSON PUBLIC SCHOOL DISTRICT, By and Through Its President, MARK BAILEY; and MIKE MOORE, In His Official Capacity as the Attorney General of the State of Mississippi;

Defendants.

COMPLAINT

Introduction

This case challenges the constitutionality of the new Mississippi school prayer law, Sections 37-13-4.1 and 37-

13-4 of the Mississippi Code, as created and amended by House Bill No. 222 of the 1994 Regular Session of the Mississippi Legislature, which requires all Mississippi public schools to authorize vocal "invocations [and] benedictions," as well as so-called "student-initiated" prayer, "during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events." The school prayer law constitutes the creation by the government of a platform reserved exclusively for prayer. The law will permit prayers to be forced upon schoolchildren, whether or not they and their parents agree with the prayers, agree with such public offerings of prayer, and agree with the forcing of prayers upon a captive audience in a state-sponsored setting. The school prayer law violates the First Amendment to the United States Constitution.

Jurisdiction ad Venue

1. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343(3) and (4), and 42 U.S.C. § 1983. The Court has authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

Parties

2. The plaintiffs David Ingebretsen, Berlena McCallum, Rev. Dr. Donald Bell, William D. Lamson, Terry Bacola, Robert McGowan, and John Baker are adult rsidents of Hinds County, Mississippi, and taxpayers and residents of the City of Jackson. Mr. Ingebretsen, Ms. McCallum, Rev. Bell, Mr. Lamson, Ms. Bacola, and Mr. McGowan are parents or step-parents of children who are students in the Jackson Public School District or were students in the district at all times relevant hereto. Anna Ingebretsen, John M. Dozier, Kathryn Diana Bell, Leigh Lamson-Quay, Brian Bacola, Darren Bacola, and Jerusha

DeGroote are residents of Hinds County and the City of Jackson and are students in the Jackson Public School District or were students in the district at all times relevant hereto. The American Civil Liberties Union of Mississippi, Inc. (ACLU), is a non-profit membership corporation in the State of Mississippi dedicated to the preservation of constitutional rights and civil liberties. Many of its members are taxpayers in the State of Mississippi and many are parents of children in the Mississippi public schools. Some of these members are taxpayers and residents in the City of Jackson and Hinds County and some are parents of children who attend school in the Jackson Public School District. The ACLU appears as a plaintiff on its own behalf and on behalf of its members and their minor children.

3. The defendant Jackson Public School District is a local governmental unit whose existence is authorized by the laws of the State of Mississippi and which administers the laws and policies that govern the public schools within its jurisdiction. It is located in Hinds County, Mississippi. The defendant Board of Trustees of the Jackson School District is the body authorized by law with setting and directing policy for the Jackson Public School District. Its President is Mark Bailey, who is a resident of Hinds County, Mississippi, as are all other members of the Board. Defendant Mike Moore is the Attorney General of the State of Mississippi. As such, he is the chief legal officer for the State. His official duties include the enforcement of the laws of the State of Mississippi and the rendering of advice and opinions to local governmental units regarding the validity or invalidity of state statutes. His office is located in Hinds County.

Factual Background

4. On April 7, 1994, the Governor of Mississippi signed House Bill No. 222 of the 1994 Regular Session of the Mississippi Legislature ("the school prayer law"),

which amended Section 37-13-4 of the Mississippi Code and created new Section 37-13-4.1. By its own terms, the school prayer law took effect on July 1, 1994. A copy of the law is attached as an appendix to this Complaint.

5. The school prayer law requires all Mississippi public schools to authorize "invocations, benedictions, or nonsectarian, nonproselytizing student-initiated voluntary prayer" to be held "during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events." Miss. Code § 37-13-4.1(2).

6. The school prayer law constitutes the creation by the government of a platform reserved specifically for prayer. It requires all public school administrators, principals and teachers to permit any and all persons to initiate and lead organized, vocal group invocations and benedictions, and any and all students to initiate and lead organized, vocal group prayers, in public school classes and at all public school activities, including assemblies, school plays, sporting events, and all other events. Such organized, vocal group invocations, benedictions and prayers are required, at the request of even a single person, at all compulsory as well as non-compulsory public school activities and events. The law authorizes prayers (including invocations and benedictions) to be forced upon schoolchildren, whether or not they and their parents agree with the prayers, agree with such public offerings of prayer, and agree with the forcing of prayers upon a captive audience in a state-sponsored setting.

7. Specifically, the new law authorizes at all school events "invocations [and] benedictions" even if they are not student-initiated, but are initiated by other persons, including teachers and school administrators, and even though they are sectarian and proselytizing. Miss. Code § 37-13-4.1(2).

8. In addition, the new law authorizes student-initiated prayer, as well as invocations and benedictions, at "com-

pulsory or non-compulsory" school events. Miss. Code § 37-13-4.1(2). The new law requires "student-initiated" prayers to be "nonsectarian" and nonproselytizing." This requires teachers, principals and other school officials to review, approve, disapprove, edit, re-write and censor the content of "student-initiated" prayers, to attempt to ensure that the prayers meet those statutory criteria.

9. Over a period of several days during the 1993-1994 school year, vocal prayers were transmitted at Wingfield High School in the Jackson Public School District over the school loudspeaker to a captive audience of students and teachers in their classrooms as authorized by the Principal of that school. Although this practice was terminated at some point, the new school prayer law, passed since that time, authorizes this practice. The Principal of Wingfield High School has stated that he will comply with this new law and permit this practice, and indeed will permit all forms of prayer that are allowed by the statute. There is little doubt that similar activity will occur throughout the Jackson Public School District. Most of the plaintiffs in this case are students and parents of students who will be in the public schools, including some at Wingfield, who have objected and do object to this activity.

10. Near the end of the 1993-1994 school year, school administrators at Forest Hill High School, in the Jackson Public School District, initiated public prayer at student honors day and at graduation by initiating a vote among students as to whether the students wanted public prayer at these events. The students then voted for these prayers and organized, vocal group prayers were held at the events.

11. When the regular school year begins in August of 1994, in the absence of injunctive relief from this Court, invocations, benedictions, and prayers will be initiated and carried out as authorized by the school prayer law at both compulsory and non-compulsory school events.

Violations

12. Sections 37-13-4.1 and 37-13-4 of the Mississippi Code, as created and amended by House Bill No. 222 of the 1994 Regular Session of the Mississippi Legislature, violate the First Amendment to the United States Constitution.

13. The transmission, offering or other giving of public invocations, benedictions, and/or prayers in the Jackson Public School District to audiences of school children during compulsory or non-compulsory school events, consistent with Sections 37-13-4.1 and 37-13-4 of the Mississippi Code, as created and amended by House Bill No. 222 of the 1994 Regular Session of the Mississippi Legislature, violates the First Amendment to the United States Constitution.

Relief

14. In light of the foregoing, the plaintiffs respectfully request the following:

a. A declaratory judgment that Mississippi Code Sections 37-13-4.1 and 37-13-4, as created and amended by House Bill No. 222 of the 1994 Regular Session of the Mississippi Legislature, are unconstitutional;

b. A preliminary and permanent injunction prohibiting the defendants from applying, implementing and enforcing Sections 37-13-4.1 and 37-13-4 of the Mississippi Code, as created and amended by House Bill No. 222 of the 1994 Regular Session of the Mississippi Legislature;

c. A preliminary and permanent injunction prohibiting the defendants from authorizing or otherwise permitting the transmission, offering or other giving of public invocations, benedictions, and prayers in the Jackson Public School District to audiences of school children at compulsory or non-compulsory school events, even if the transmission, offering or giving is consistent with Sections 37-13-4.1 and 37-13-4 of the Mississippi Code, as created

and amended by House Bill No. 222 of the 1994 Regular Session of the Mississippi Legislature;

d. An order awarding the plaintiffs their costs of this action, including attorneys' fees pursuant to 42 U.S.C. § 1988; and

e. Such other relief which this Court deems just and appropriate.

Respectfully Submitted,

/s/ Robert B. McDuff

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Attorneys for the Plaintiffs

Dated: July 15, 1994

APPENDIX F

TESTIMONY FROM CROSS EXAMINATION OF JACKSON SCHOOL DISTRICT ACTING SUPERINTENDENT DAN MERRITT BY ASSISTANT ATTORNEY GENERAL,

Pages 3R. 30-31, 36

BY MR. COLE:

Q. Doctor Merritt, based on your own personal knowledge, can you give the Court one incident in the last three weeks which on your personal knowledge leads you to believe that any student is going to engage in any particular type of religious speech at any particular activity?

* * * *

A. I don't have any personal knowledge. Of course, today represents the third day the school has been open.

Q. So, you don't have any personal knowledge of any —no student, to your knowledge, has indicated that they are going to engage in religious speech of any type at any particular activity at this time?

A. I have not as of this date, this school year.

* * * *

Q. Well, you don't have any personal knowledge of any—or any imminent risk of any particular student doing anything at any particular student assembly; do you?

A. If you're talking about now, the beginning of the school year, I don't have any personal knowledge.

Q. Okay. And I just want to make sure this is clear for the record. You don't have any personal knowledge, and indeed I believe you testified it would be against the policy of the Jackson School District for a teacher or an administrator to initiate, sponsor, direct, or mandate that any type of religious activity occur or take place with regard to students?

A. That is—that's correct.

APPENDIX G

TESTIMONY FROM CROSS-EXAMINATION OF JACKSON PROVINE HIGH PRINCIPAL EMMANUEL REEVES BY ASSISTANT ATTORNEY GENERAL, Page 3 R. 53

BY MR. COLE:

Q. Now, I presume—tell me if I'm wrong, but once instructional time begins, the policy of the school district is that work time is for work; is that correct?

A. Once school—

Q. Once your instructional time period in class begins, it's the policy of the school district that work time is for work; is it not?

A. Yes, it is.

Q. And you haven't had any situations in which students have sought to engage in prayer during those classroom activities at this point?

A. Our policy does not allow for our students to enter in a setting where our students are engaged in academic time. It has not been our policy to permit that in the past, based upon our district policies, but rather if students wanted to engage in religious activities, it could be done during their free time or time that they may have when they may not be engaged in classroom instructional time.

Q. But you—to repeat my question, you haven't had any situation in which students, during class instructional time, have sought to engage in any type of group religious speech?

A. No.

* * * *

Supreme Court, U.S.
FILED
SEP 30 1996
OFFICE OF THE CLERK

No. 96-331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI,
Petitioner,
v.
DAVID INGEBRETSEN, ON BEHALF OF HIMSELF and HIS DAUGHTER, ANNA INGEBRETSEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-331

MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI,
Petitioner,

v.

DAVID INGEBRETSEN, ON BEHALF OF HIMSELF and HIS DAUGHTER, ANNA INGEBRETSEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the issuance of a preliminary injunction against the implementation of part of a 1994 Mississippi school prayer statute, Miss. Code §§ 37-13-4 and 37-13-4.1 (hereafter "the School Prayer Law"). In pertinent part, the School Prayer Law requires all public schools in the state to authorize "invocations, benedictions" and "nonsectarian, nonproselytizing student-initiated voluntary prayer" at all school-related student events, compulsory as well as non-compulsory. Miss. Code § 37-13-4.1(2).[1] As the court of appeals explained, the School Prayer Law thus "gives a preferential, exceptional benefit to religion that it does not extend to anything else."

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[1] The full text of the School Prayer Law is set out in the appendix to the petition ("Pet. App.") at 64a-66a.

Ingebretsen v. Jackson Public School District, 88 F.3d 274, 279 (5th Cir. 1996), Pet. App. at 6a.

As the district court found, the School Prayer Law was enacted in response to a widely-publicized incident in which a public high school principal in Jackson, Mississippi authorized use of the school's public address system by students during the school day to recite prayers to all students at the school, who were required to be in their classrooms. The principal took this action despite having been previously advised by counsel for the Jackson Public School District that the practice was unconstitutional and improper. *Ingebretsen v. Jackson Public School District*, 864 F. Supp. 1473, 1478-79 (S.D. Miss. 1994), Pet. App. at 31a-34a. Following public expressions of support across the state for the actions of the principal, who had been disciplined for ignoring the advice of the school district's counsel, the Mississippi Senate passed a resolution in March 1994 commending the principal for his actions as the "catalyst for a renewed effort all over this state and nation to return prayer to our public schools." Pet. App. at 33a-34a, 864 F. Supp. at 1479. Several days later, the state Senate and the House of Representatives passed the School Prayer Law, which was to take effect on July 1, 1994. Pet. App. at 34a, 864 F. Supp. at 1479.

This lawsuit was filed by the respondents on July 15, 1994, approximately one month prior to the start of the 1994-1995 school year. Respondents include students enrolled in the Jackson public schools, parents of those students in their capacities as parents and taxpayers, and the American Civil Liberties Union of Mississippi, suing on its own behalf and on behalf of its members and their minor children. Pet. App. at 30a, 864 F. Supp. at 1477. The Complaint contends that the statute violates the Establishment Clause, and seeks permanent injunctive and declaratory relief. Pet. App. at 70a-76a. A motion for a preliminary injunction to preserve the status quo was filed simultaneously with the Complaint.

The original defendants in this action were the Attorney General of Mississippi (petitioner herein) and the Jackson Public School District and its Board of Trustees. The Attorney General opposed the motion for a preliminary injunction and filed a motion to dismiss the Complaint.[2] The School District admitted the facts pleaded in the Complaint and conceded that, absent an injunction, the new law would be invoked once school began; otherwise, it took no further position in the case. 1 R. at 25.[3] The case was assigned to the Honorable Henry T. Wingate.

On August 4, 1994, Judge Wingate heard oral argument on the plaintiffs' motion for a preliminary injunction and on the Attorney General's motion to dismiss. On August 11, 1994, Judge Wingate issued a Memorandum Opinion and Order in which he concluded that the new statute had serious constitutional problems and temporarily enjoined the law pending a further hearing to consider, *inter alia*, the possibility of severing those portions of the law that were unconstitutional. 1 R. at 80, 87-88. On August 16, 1994, Judge Wingate conducted an evidentiary hearing and heard further argument. Respondents submitted documentary evidence to the court and called as witnesses the Interim Superintendent of the Jackson Public School District, Dr. Dan Merritt, as well as Dr. Emanuel Reeves, a high school principal in the Jackson Public School District, each of whom has had more than 25 years of experience in the schools. (3 R. at 5-6, 39-41). The Attorney General called no witnesess.

On September 2, 1994, the court denied the Attorney General's motion to dismiss and granted, in part, the plaintiffs' motion for a preliminary injunction. In granting partial preliminary relief, the district court found a sub-

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[2] The motion to dismiss asserted a host of alleged bars to the consideration of this case, including abstention, an alleged lack of state action, a challenge to the respondents' standing, and the assertion that no case or controversy existed. Pet. App. at 36a-37a, 864 F. Supp. at 1480.

[3] "R." refers to the three-volume record below.

stantial threat that, absent such relief, the statute would be invoked once school began:

> The testimony of Dr. Merritt and Dr. Reeves that they constantly have been besieged by student requests to have public, classroom prayer and that they reasonably expect many students to act under the school-prayer statute at issue here amply demonstrates that the risk of injury is neither remote nor speculative.

Pet. App. at 42a, 864 F. Supp. at 1482 (transcript citations omitted).[4] The court explained that its conclusion was further supported by evidence regarding the events in Jackson that led to passage of the School Prayer Law, including the public support by students and adults of the intercom prayers. Pet. App. at 42a, 864 F. Supp. at 1482-83. Indeed, the defendant Jackson Public School District conceded in its response to the plaintiffs' motion for a preliminary injunction that "[t]here can be no doubt that the state law challenged here will be invoked by administrators, teachers or students when school starts." 1 R. at 25.

---

[4] Dr. Reeves and Dr. Merritt also testified that "the statute as written would disrupt instructional and educational activities throughout the District." Pet. App. at 51a-52a, 864 F. Supp. at 1487. Based on their testimony, the district court found that "these eminent educators reasonably apprehend that the effect of this far-sweeping statute would cause disharmony, confusion, and upset." Pet. App. at 52a, 864 F. Supp. at 1487. As he did unsuccessfully in the court of appeals, petitioner attempts to invite this Court to second-guess the district court's findings by relying on a small portion of the testimony, taken out of context and selectively reprinted in the Appendix, which allegedly shows that Dr. Reeves and Dr. Merritt lacked "personal knowledge" of the likelihood that the statute would be invoked once school began. Pet. at 4 n.3. In fact, these transcript excerpts reveal merely that at the time of the hearing, August 16, 1994, three days after the end of summer recess, no specific student had come to either witness and expressly stated that he or she would have invoked the School Prayer Law had it not been enjoined on August 4. Pet. App. at 77a-78a.

In ruling on respondents' preliminary injunction motion, the district court specifically analyzed each part of the statute that respondents contended violates the Establishment Clause and sought, as requested by petitioner, to avoid a construction that would invalidate the law. Pet. App. at 38a, 50a-60a, 864 F. Supp. at 1481, 1486-1491. After applying the familiar four-part test for determining whether to grant preliminary relief, the court preliminarily enjoined the School Prayer Law, except for the portion of the law authorizing "nonsectarian, nonproselytizing student-initiated voluntary prayer at high school commencement." Pet. App. at 63a, 864 F. Supp. at 1492. That portion of the law, the court explained, appeared to be constitutional based on the prior decision of the court of appeals in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). *Id.*

With respect to the remainder of the School Prayer Law, the court found that respondents had demonstrated a substantial likelihood of success on their First Amendment claims based on all five of the criteria used by the court of appeals and by the members of this Court in evaluating Establishment Clause claims.[5] The court further found that respondents had "adequately demonstrated that they would suffer irreparable injury" if the statute were not enjoined, specifically citing this Court's admonition in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Pet. App. at 60a, 864 F. Supp. at 1491.

---

[5] As recited by the district court, those five tests involve a determination of whether the purpose of the statute or practice at issue is predominantly secular; whether the statute or practice would have a primary effect that advances or inhibits religion; whether it would result in excessive government entanglement with religion; whether it constitutes government endorsement of religion; and whether it would have a coercive effect on students in terms of religious exercise. Pet. App. at 49a-50a, 864 F. Supp. at 1486.

Petitioner appealed from the September 2, 1994 Order partially granting the preliminary injunction and denying his motion to dismiss, and respondents cross-appealed from that portion of the Order denying the preliminary injunction with respect to high school graduations. On January 10, 1996, the Fifth Circuit affirmed the district court's ruling in full. The court's opinion specifically noted that the preliminary injunction "affected only the School Prayer Statute and would not affect students' existing rights to the free exercise of religion and free speech." Pet. App. at 8a, 88 F.3d at 280. On May 31, 1996, the court denied the petitioner's Suggestion for Rehearing En Banc. The Petition for a Writ of Certiorari was filed on August 29, 1996.

REASONS FOR DENYING THE WRIT

Petitioner has failed to advance a sound reason why this Court should consider the questions that he contends are raised by the decision of the court of appeals. He alleges no conflict among the circuits on these questions. He shows no departure from this Court's decisions in the lower courts' resolution of the asserted questions, nor any justification for this Court to overrule the precedents that control those questions. In addition, the procedural posture of this case, involving a partial grant of a preliminary injunction based on an evidentiary hearing, factual findings by the district court, and statutory analysis by the courts below of separable portions of the School Prayer Law, makes it particularly inappropriate for review by this Court.

1. Stripped of its hyperbole and its florid rhetoric, the petitioner's brief first asserts that the respondents lacked standing to bring this action, and that no "ripe" case or controversy exists. After conducting an evidentiary hearing, however, the district court found as a matter of fact that the School Prayer Law was likely to be invoked absent preliminary injunctive relief, that respondents would "suffer irreparable injury," and that this risk of

injury was "neither remote nor speculative." Pet. App. at 60a, 42a, 864 F. Supp. at 1491, 1482. The court of appeals agreed. Pet. App. at 4a, 88 F.3d at 278. The district court's factual findings are of course entitled to deference. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). In addition, the issuance of a preliminary injunction itself is reviewed only for an abuse of discretion. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). Thus, petitioner's assertions regarding standing and ripeness, which the lower courts found to be meritless, raise no important question for this Court.

2. With respect to the respondents' standing, the courts below followed the well-established precedents of this Court and the lower federal coutrs recognizing that parents and students have the requisite stake in the outcome of challenges to public school prayer and similar statutes and practices under the Establishment Clause to satisfy standing requirements. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (challenge by parents to law authorizing "equal time" for teaching creationism); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (challenge by parent to "moment of silence"-for-school-prayer statute); *Treen v. Karen B.*, 455 U.S. 913 (1982), *summarily affirming Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (challenge by parents to school prayer statute and regulation); *School District of Abington Township v. Schemmp*, 374 U.S. 203 (1963) (challenge by parents and students to government-endorsed school prayer and Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (challenge by parents to government-sponsored school prayer). Indeed, it would be difficult to imagine plaintiffs with a greater stake in the outcome of such cases than the parents and students of the local public schools affected by the statute or practice at issue.

Likewise, in rejecting petitioner's contention that no "ripe" case or controversy existed, the lower courts properly followed the clear precedents of this Court permitting

the adjudication of facial challenges to statutes or practices as violative of the Establishment Clause, including challenges brought prior to implementation. *See, e.g., Edwards v. Aguillard, supra* (successful pre-implementation facial challenge to state statute mandating "equal time" for creationism if evolution is taught); *Wallace v. Jaffree, supra* (successful facial challenge to state statute authorizing a moment of silence specifically for prayer in school); *Treen v. Karen B., supra* (successful facial challenge to school prayer practice that had "yet to be put into effect," *Karen B. v. Treen*, 653 F.2d at 902); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (successful pre-implementation facial challenge to statute providing tuition reimbursement and tax benefits to parents of children attending religious schools). Petitioner has offered no reason to review this case in light of the consistent decisions by this Court.[6]

3. Petitioner's complaint about the manner in which the courts below reviewed the School Prayer Law on its face similarly raises no important issue for this Court. Both courts properly evaluated respondents' Establishment Clause challenge to the statute exactly as this Court has instructed, using precisely those tests set out by the Court

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[6] Although petitioner complains that the School Prayer Law had not and in theory might not be implemented, this Court has struck down statutes under the Establishment Clause in similar circumstances. For example, the statute held to be facially unconstitutional in *Edwards v. Aguillard* did not mandate the teaching of either evolution or creationism, but provided only for "equal time" for creationism *if* evolution were taught. 482 U.S. at 581. Thus, the statute might theoretically never have been implemented. Petitioner's argument implies not only that *Edwards* and numerous other decisions were incorrect, but also that there could never be a preliminary injunction in an Establishment Clause challenge to a statute. Particularly where, as here, the lower courts found a substantial likelihood that the School Prayer Law *would* be implemented absent preliminary relief and that irreparable injury would occur absent such relief, there is no justification for this Court to review the decisions below.

for reviewing similar facial challenges to a law under the Establishment Clause. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Edwards v. Aguillard, supra*, 482 U.S. at 582-85; *Wallace v. Jaffree, supra*, 472 U.S. at 55-56; *Treen v. Karen B., supra*; *Committee for Public Education and Religious Liberty v. Nyquist, supra*, 413 U.S. at 772-74. The decision below is therefore consistent with a long line of decisions by this Court.

4. Petitioner fails to adduce even a single decision by this Court or any court of appeals holding that the methodology employed in *United States v. Salerno*, 481 U.S. 739 (1987), should be applied instead in Establishment Clause cases or that the established method of analysis utilized below was erroneous.[7] Even assuming, *arguendo*, that petitioner's question regarding *Salerno* merited consideration by this Court in an appropriate case, that question is not squarely presented here. Because the School Prayer Law contains a severability clause, the courts below in fact effectively performed a *Salerno*-type analysis by considering in what circumstances, if any, the statute could constitutionally be applied and then severed those portions.[8]

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[7] Petitioner's effort to reconcile *Bowen* with *Salerno* (Pet. at 15-16 n.14) cannot withstand scrutiny. The opinion of the Court in *Bowen*, written by Chief Justice Rehnquist, who was also the author of *Salerno*, never even mentions *Salerno*. Instead, it articulates the various tests used to adjudicate a facial challenge to a statute under the Establishment Clause, 487 U.S. at 602, tests (such as examining the purpose of a statute) that bear no relationship to *Salerno*, which evaluates the facial validity of a statute by considering only whether the statute may be constitutionally applied. Moreover, as explained in Justice Blackmun's dissent in *Bowen*, the defendant in that case had argued to this Court that the court of appeals had erred by not utilizing the methodology of *Salerno*. 487 U.S. at 627 n.1. Justice Blackmun expressly agreed with the implicit holding of the majority that *Salerno* was inapplicable, finding it to be "wholly incongruous" with the Court's Establishment Clause jurisprudence. *Id.*

[8] Indeed, petitioner expressly urged the district court to adopt a severability approach to the statute if it found any portion of the statute to be unconstitutional. Pet. App. at 68a.

Specifically, the district court held an initial hearing on plaintiffs' preliminary injunction motion just prior to the start of the 1994-95 school year, and concluded that while the statute had "a constitutional defect" in some respects, it could also be applied constitutionally to high school graduation ceremonies in light of *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), which upheld a school district policy permitting "student-initated" prayer at high school graduations. 1 R. at 80, 86-87 (Memorandum Opinion and Order of Aug. 11, 1994). The court then held "a supplemental hearing to determine what portion of the statute, if any, could escape the injunction by its severability clause." Pet. App. at 4a, 88 F.3d at 278. Following the hearing, the court held that the School Prayer Law was constitutional insofar as it applied to high school graduation ceremonies, and *refused* to enjoin the statute in that respect. The Fifth Circuit affirmed.[9] The lower courts thus conducted precisely the type of "narrow, case-by-case adjudication" that petitioner claims is appropriate in a case such as this (Pet. at 16). For this reason as well, review clearly is not warranted.

5. Petitioner concludes with an improper effort to discuss the merits of the Establishment Clause in this case, which petitioner has chosen *not* to raise as a question for review, in an attempt to mischaracterize what this case is and is not about. Pet. at 18-19. This lawsuit challenges the constitutionality of the enactment of a statute by the state of Mississippi, nothing more and nothing less. It does not, as petitioner erroneously suggests, seek

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[9] For the record, respondents do not agree that *Jones* properly interprets the Establishment Clause. *See ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (en banc); *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 115 S. Ct. 2604 (1995); *Gearon v. Loudoun County School Board*, 844 F. Supp. 1097 (E.D. Va. 1993). However, this issue is not presently before the Court.

to bar the private speech of private actors, nor to deprive any students of any independently existing constitutional right to pray in public schools. As the court of appeals recognized, the preliminary injunction affects only the School Prayer Law and not "students' existing rights to the free exercise of religion and free speech. Therefore, students continue to have exactly the same constitutional right to pray as they had before the statute was enjoined." Pet. App. at 8a, 88 F.3d at 280. The district court likewise explained:

> as acknowledged by the Attorney General, the students' rights of Free Speech and Free Exercise are pre-existing and, as such, the granting of an injunction would have no bearing on the students' ability to freely exercise their pre-existing rights. An injunction would not prevent students from praying silently alone or assembling together to pray before or after school. In fact, Dr. Reeves testified that Provine High School, across town from Wingfield High, presently allows a student prayer group to meet on the school grounds for the purpose of having morning prayers.

Pet. App. at 45a, 864 F. Supp. at 1484. Petitioner has simply failed to justify review of the decisions below by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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No. 96-331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI,
Petitioner,

v.

DAVID INGREBRETSEN and AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this Reply Brief in response to points raised in the Respondents' Brief in Opposition.

1. Respondents assert in their Brief in Opposition [1] at pp. 6-7 that certiorari is inappropriate in this case because the lower courts' determination of standing and ripeness are "factual findings" subject to deferential review under the clearly erroneous rule. This suggestion is without merit. It is fundamental that the clearly erroneous rule does not immunize a lower court's view of the controlling law from plenary consideration. As observed in *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982),

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[1] Citations to Respondents' Brief in Opposition to certiorari will hereinafter be to "R. Opp. at ——."

> [t]he [clearly erroneous] Rule does not apply to conclusions of law. [I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis.

In the instant matter, the lower courts refused to acknowledge or apply the "irreducible minimum" legal requirements of standing to obtain injunctive relief set forth in numerous cases of this Court. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L.Ed.2d 351 (1992). The proper legal standards concerning standing and ripeness were ignored, and, accordingly, the clearly erroneous rule plainly does not set the tone for review.[2] Moreover, where standing is in question, this Court will independently review the record in *de novo* fashion to determine if the requirements have been met. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-236 (1990); *Lujan*, 119 L.Ed.2d at 364-365.

2. Respondents further claim that review is inappropriate because "parents and students" have standing to make Establishment Clause challenges to "public school prayer" statutes. R. Opp. at 7-8. While one may obvi-

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[2] There may, of course, be appellate cases in which the underlying factual findings upon which a determination of standing is made, given the proper legal standards, may turn on a clearly erroneous analysis. This, however, is not such a case.

Respondents' further suggestion that an "abuse of discretion" standard for review of preliminary injunctions should apply, R. Opp. at 7, similarly misses the mark. First, standing to obtain injunctive relief of any kind must necessarily exist at each stage of review. See *Lujan*, 119 L.Ed.2d at 365. It is a "special obligation" of the federal courts to make sure that standing exists. *FW/PBS*, 493 U.S. at 231, *quoting Allen v. Wright*, 468 U.S. 737, 750 (1984). Second, the lower courts' preliminary injunction in this case was not simply a vehicle to preserve the relative positions of the parties, but was effectively a final determination of the merits of the facial constitutionality of Chapter 609.

ously agree with the proposition that particular students may have standing to challenge school practices that in fact personally and directly affect them, and their parents may have derivative standing, mere status as a "parent" or "student", in the abstract, is *not* enough to establish standing. In *Lujan*, Justice Kennedy in concurring summarized the controlling principle:

> While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures *him in a concrete and personal way*. This requirement is not just an empty formality.

Lujan, 119 L.Ed.2d at 377 (Kennedy, J., concurring) (emphasis supplied). Absent personal, imminent, injury to the plaintiff himself, standing based on mere status as a student, parent, etc., is nothing other than a form of "citizen" standing which has been rejected by this Court on numerous occasions, *see, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-223 (1974).

In this regard, the Respondents assert that such cases as *Edwards v. Aguillard*, 482 U.S. 578 (1987), *Wallace v. Jaffree*, 472 U.S. 38 (1987), and *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), are "precedent" for their claims that parents and students have a generalized form of standing and that "pre-implementation" facial challenge under the Establishment Clause are automatically ripe for review. R. Opp. at 7-8. None of those cases are "precedent" for these broad reaching assertions,[3] however, because none expressly discussed these specific issues. The Supreme Court has never considered itself bound by assumptions in previous cases or even prior *sub silentio* holdings when

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[3] Compare *Valley Forge Christian College, supra*, where the Court expressly held that the specific requirements of standing and of a concrete "case or controversy" applied to Establishment Clause challenges, just as to other constitutional litigation.

a jurisdictional issue is squarely presented in a subsequent case. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n. 4 (1989). Moreover, as Circuit Judge Jones pointed out in dissent, the prayer statutes involved in such cases as *Karen B.* are materially different from Chapter 609. Pet. App. A, 18a-19a and note 9.

3. Respondents suggest in points 3 and 4 of the Brief in Opposition, R. Opp. at 8-10, that the courts below used "those tests set out by the Court for reviewing similar facial challenges to a law under the Establishment Clause," i.e. the multipartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), thus implying that the burden of proof considerations set forth in *United States v. Salerno*, 481 U.S. 730, 745 (1987) and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990), can play no part. This effort by Respondents to exclude the *Salerno/Akron Center* burden of proof from consideration is an effort to confuse apples and oranges. The burden of proof methodology utilized in a facial challenge does not replace, or substitute for, the substantive constitutional test to be employed.[4] Where a statute like Chapter 609 is challenged on its face, and thus as being "incapable of *any* valid application",[5] it is only appropriate that a heavy burden apply and that a judgment not be based upon worst case hypotheticals. Respondents do not explain how Establishment Clause cases are exempt from these considerations.

4. Respondents further suggest, rather disingenuously, that the lower courts "effectively" performed a *Salerno*

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[4] For the record, Petitioner disagrees with Respondents' suggestion that the *Lemon* test is the applicable substantive standard. Instead, of the current Establishment "tests", the school sponsorship/coercive effect analysis of *Lee v. Weisman*, —— U.S. ——, 120 L.Ed.2d 467 (1992), seems to best supply the substantive standard. See *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963, 969-972 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993).

[5] *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n. 5 (1982) (emphasis supplied).

analysis because student-initiated commencement invocations were severed from the general overriding determination of facial unconstitutionality of Chapter 609.[6] R. Opp. at 9-10. Petitioners respectfully submit that the Court of Appeals and District Court could not "effectively" perform a *Salerno* analysis while expressly holding that the *Salerno* burden did not apply to Establishment Clause cases and while relying upon a "worst case" analysis of Chapter 609. See Pet. App. A at 7a note 2; at 43a-44a. Chapter 609 is a statute that has a "manifold variety" of possible applications, 22a, with regard to a "daunting variety of activities daily undertaken," 15a; any "effective" analysis under *Salerno* and *Akron Center* would hold that Chapter 609 is not *facially* invalid.

5. Finally, with regard to Respondents' disclaimer, R. Opp. at 10-11, that the lawsuit and injunction are really benign and do not "bar the private speech of private actors" or damage what they term as "pre-existing" rights, Petitioner stands by the proposition that the injunction of Chapter 609 as unconstitutional on its face confuses and undermines the rights of third party students and is a *de facto* message of hostility to protected student religious viewpoints. This is particularly true where, as here, the expressed goal of the enjoined statute is to recognize rights provided by the "First Amendment . . . and the judicial interpretations thereof as given by the Supreme Court." Pet. App. C, 64a-65a. Respondents refuse to acknowledge that First Amendment freedoms require "breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and that broad injunctions which implicate First Amendment speech rights are highly disfavored, *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-184 (1968).

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[6] Circuit Judge Jones in dissent termed this "leaving a sliver of liberty" for student-initiated graduation ceremony prayers. Pet. App. A at 13a.

Petitioner respectfully prays that the Petition for a Writ of Certiorari will be granted and that the judgment of the Court of Appeals will be summarily reversed and vacated, or that this case will be set for oral argument and full briefing.

Respectfully submitted,

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